No. 5306

Supreme Court, U. S.
FILED
DEC 20 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5306

ERNEST JOHN DOBBERT, JR.,
Petitioner,

—*v.*—

STATE OF FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1976
CERTIORARI GRANTED NOVEMBER 8, 1976

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5306

ERNEST JOHN DOBBERT, JR.,

Petitioner,

—*v.*—

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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DOCKET ENTRIES

CRIMINAL DOCKET

SUPREME COURT OF FLORIDA

No. 45,558

ERNEST JOHN DOBBERT, JR.

vs.

STATE OF FLORIDA

DATE	PROCEEDINGS
1974	
May 17	Transfer Order—DCA-1st, Case #V-431, Notice of Appeal
Oct. 28	Appellant's Briefs & Summary of evidence w/ Index to Appendix B
1975	
Jan. 16	Briefs of Appellee State
Feb. 5	O.A. (Oral Argument) granted
Mar. 10	Reply Briefs of Appellant
Mar. 10	O.A. (Oral Argument) postponed til 4-3-75.
1976	
Jan. 14	Opinion (PC) Judgments and sentences of the Circuit Court appealed from are affirmed
Jan. 29	Pet. for Rehearing
Jan. 29	Motion for Stay Issuance of Mandate
Feb. 3	Response to Rehearing
Mar. 3	Motion for leave to Amend Rehearing
Apr. 29	Copy of Application for Stay in U.S. Supreme Court
May 6	Copy of U.S. Supreme Court Order Staying Proceedings (execution)

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY, FALL TERM, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND SEVENTY-THREE.

STATE OF FLORIDA

vs

ERNEST JOHN DOBBERT, JR.

INDICTMENT FOR MURDER IN THE FIRST DEGREE AND CHILD TORTURE

IN THE NAME OF AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

FIRST COUNT

The Grand Jurors of the State of Florida and County of Duval empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ERNEST JOHN DOBBERT, JR., of the County of Duval and State of Florida, on the Thirty-First day of December, in the year of our Lord One Thousand Nine Hundred and Seventy-One, in the County and State aforesaid, did commit various assaults upon one KELLY ANN DOBBERT and in some way and manner, and by kicking, choking, and torturing with his hands and feet, and by use of other instruments, and weapons to the Jurors unknown, he, the said ERNEST JOHN DOBBERT, JR., did then and there unlawfully, and from a premeditated design to effect the death of the said KELLY ANN DOBBERT, inflict and create in the said KELLY ANN DOBBERT certain mortal injuries and mortal sickness, a further description whereof is to the Jurors unknown, of which mortal injuries and sickness to the Jurors unknown, the said KELLY ANN DOBBERT then and there died, contrary to the provisions of Section 782.04, Florida Statutes, and against the peace and dignity of the State of Florida.

SECOND COUNT

And for a second count of this Indictment, the Grand Jurors of the State of Florida and County of Duval empaneled and sworn to inquire and true presentment made in and for the body of the County of Duval, upon their oaths, do present and charge that ERNEST JOHN DOBBERT, JR., of the County of Duval and State of Florida, between the First day of January and the Eighth day of April, both in the year of our Lord One Thousand Nine Hunderd and Seventy-Two, in the County and State aforesaid, did commit various assaults upon one RYDER SCOTT DOBBERT and in some way and manner, and by some means, instruments, and weapons to the Jurors unknown, he, the said ERNEST JOHN DOBBERT, JR., did then and there unlawfully, and from a premeditated design to effect the death of the said RYDER SCOTT DOBBERT, inflict and create in the said RYDER SCOTT DOBBERT certain mortal injuries and mortal sickness, a further description whereof is to the Jurors unknown, of which mortal injuries and sickness to the Jurors unknown, the said RYDER SCOTT DOBBERT then and there died, contrary to the provisions of Section 782.04, Florida Statutes, and against the peace and dignity of the State of Florida.

THIRD COUNT

And for a third count of this Indictment, the Grand Jurors of the State of Florida and County of Duval empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ERNEST JOHN DOBBERT, JR., of the County of Duval and State of Florida, during a period of time from on or about the First day of August, in the year of our Lord One Thousand Nine Hundred and Seventy-One until on or about the Eleventh day of April, in the year of our Lord One Thousand Nine Hundred and Seventy-Two, in the County and State aforesaid, did then and there unlawfully and wilfully torture and mutilate and cruelly, wantonly and

with malice unlawfully punish and torment HONROE ELIZABETH DOBBERT, and in committing a battery upon the said HONORE ELIZABETH DOBBERT, did intentionally and knowingly cause great bodily harm, permanent disability and permanent disfigurement to the said HONORE ELIZABETH DOBBERT, a child under the age of sixteen (16) years, to-wit: five (5) years of age, contrary to the provisions of Section 828.04(1), Florida Statutes, and against the peace and dignity of the State of Florida.

FOURTH COUNT

And for a fourth count of this Indictment, the Grand Jurors of the State of Florida and County of Duval empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ERNEST JOHN DOBBERT, JR., of the County of Duval and State of Florida, during a period of time from on or about the First day of August, in the year of our Lord One Thousand Nine Hundred and Seventy-One until on or about the Eighth Day of April, in the year of our Lord One Thousand Nine Hundred and Seventy-Two, in the County and State aforesaid, did then and there unlawfully and wilfully torture and mutilate and cruelly, wantonly and with malice unlawfully punish and torment ERNEST JOHN DOBBERT, III, and in committing a battery upon the said ERNEST JOHN DOBBERT, III, did intentionally and knowingly cause great bodily harm, permanent disability and permanent disfigurement to the said ERNEST JOHN DOBBERT, III, a child under the age of sixteen (16) years, to-wit: eleven (11) years of age, contrary to the provisions of Section 828.04(1), Florida Statutes, and against the peace and dignity of the State of Florida.

/s/ Ervine C. Hilliard, Jr.
ERVINE C. HILLIARD, JR.
Foreman of the Grand Jury

/s/ Harry L. Shorstein
HARRY L. SHORSTEIN
Chief Assistant State Attorney, Fourth Judicial Circuit of Florida, In and For Duval County, Prosecuting for said State.

I, HARRY L. SHORSTEIN, Chief Assistant State Attorney, Fourth Judicial Circuit of Florida, in and for Duval County, hereby certify that I, as such Prosecuting Officer and as authorized and required by law, have advised the Grand Jury which returned this Indictment.

/s/ Harry L. Shorstein
HARRY L. SHORSTEIN
Chief Assistant State Attorney

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY, FALL TERM, 1973

Case No. ————

THE STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

INDICTMENT FOR MURDER IN THE FIRST DEGREE AND CHILD TORTURE

A TRUE BILL

/s/ Ervine C. Hilliard, Jr.
Foreman of the Grand Jury

WITNESSES FOR THE STATE

INV. G. H. PARKER
DR. PETER LIPKOVIC

Presented in open Court by the Grand Jury and filed this 27th day of December, 1973.

/s/ S. Morgan Slaughter
S. MORGAN SLAUGHTER
Clerk Circuit Court

By /s/ J. Z. Pearce
J. Z. PEARCE
Deputy Clerk

DONALD G. NICHOLS
State Attorney

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

MOTION

Comes now the Defendant by and through his undersigned attorney and moves that this Honorable Court enter an order specifying the manner of trial, number of trial jurors, and the penalties applicable to counts one and two of the indictment herein. As grounds for said motion, the Defendant would show unto the court:

1. The indictment herein only alleges a violation of Florida Statutes 782.04 and the undersigned attorney submits that there is presently great confusion in the law as to the manner of trial and the applicable penalties in a case where the alleged offense occurred at the time specified in this indictment.
2. The confusion exists as a result of the case of *State* v. *Lee*, Case No. R-452, 1st D.C.A. Fla., November 2, 1973, question certified to Florida Supreme Court January 7, 1974.
3. Unless this court enters its pre-trial order as requested, defense counsel is unable to properly advise the defendant herein and is unable to properly prepare a defense.

LOUIS O. FROST, JR.
Public Defender

By /s/ John Southwood
JOHN D. SOUTHWOOD
Chief Assistant Public Defender

[Certificate of Service Omitted in Printing]

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

MOTION FOR CONTINUANCE

Comes now the Defendant, by and through his undersigned attorney, pursuant to Rule 3.190(g), Rules of Criminal Procedure, and moves this Honorable Court to stay the setting of this case for trial and to continue the trial of this case indefinitely until the Florida Supreme Court renders its opinion in *State* v. *Lee*, Case No. 44,903.

As grounds for said motion, the Defendant would show unto the Court:

1. Count One and Count Two of the Indictment herein allege a violation of Florida Statutes 782.04 and the undersigned attorney submits that there is presently great confusion in the law as to the manner of trial and the applicable penalties in a case where the alleged offense occurred at the time specified in the Indictment.

2. The confusion exists as a result of the opinion rendered in the case of *State* v. *Lee*, (Case No. R-452, 1st D.C.A., November 2, 1973). Following is a chronology of this Case.

   November 2, 1973—Opinion rendered.

   January 7, 1974—Petition for Rehearing denied, Mandate issued, and case certified to Florida Supreme Court as a question of great public interest.

January 22, 1974—Petition for Certiorari filed with Florida Supreme Court—Further trial court proceedings and mandate of the District Court of Appeals stayed pursuant to Rule 4.5c(6), Florida Appellate Rules.

January 24, 1974—Petition for Certiorari granted by Florida Supreme Court—oral arguments set for March 14, 1974. (Case No. 44,903).

3. Until the Florida Supreme Court renders its opinion in *State* v. *Lee*, Counsel and this Court will be unable to determine the applicable law as to manner of trial, number of trial jurors, and the extent of the statutory penalties for the alleged offenses.

LOUIS O. FROST, JR.
Public Defender

By /s/ John Southwood
JOHN D. SOUTHWOOD
Chief Assistant Public Defender

[Certificate of Service Omitted in Printing]

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

CERTIFICATE OF GOOD FAITH

The undersigned counsel hereby certifies that the Motion for Continuance filed in this cause on January 30, 1974, was made in good faith and not as a means for unnecessary delay.

LOUIS O. FROST, JR.
Public Defender

By /s/ John Southwood
JOHN D. SOUTHWOOD
Chief Assistant Public Defender

[Certificate of Service Omitted in Printing]

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY, FALL TERM, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND SEVENTY-THREE.

STATE OF FLORIDA

vs

ERNEST JOHN DOBBERT, JR.

INDICTMENT FOR MURDER IN THE FIRST DEGREE AND CHILD TORTURE

This Indictment amends Counts Three and Four of the original Indictment in Case Number 73-5068 that was returned by this same Grand Jury and presented in Open Court on the Twenty-Seventh day of December, in the year of our Lord One Thousand Nine Hundred and Seventy-Three. The changes in Counts Three and Four merely limit the periods of time of the commission of the offenses. This Indictment is a continuation of the prosecution which began with the filing of the original Indictment on the Twenty-Seventh day of December, in the year of our Lord One Thousand Nine Hundred and Seventy-Three. In addition to the evidence considered this day, the Grand Jurors have reconsidered all of the evidence presented to it on the Twenty-Seventh day of December, in the year of our Lord One Thousand Nine Hundred and Seventy-Three in returning this Indictment.

IN THE NAME OF AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

FIRST COUNT

The Grand Jurors of the State of Florida and County of Duval empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ERNEST JOHN DOBBERT, JR., of the County of Du-

val and State of Florida, on the Thirty-First day of December, in the year of our Lord One Thousand Nine Hundred and Seventy-One, in the County and State aforesaid, did commit various assaults upon one KELLY ANN DOBBERT and in some way and manner, and by kicking, choking, and torturing with his hands and feet, and by use of other instruments, and weapons to the Jurors unknown, he, the said ERNEST JOHN DOBBERT, JR., did then and there unlawfully, and from a premeditated design to effect the death of the said KELLY ANN DOBBERT, inflict and create in the said KELLY ANN DOBBERT certain mortal injuries and mortal sickness, a further description whereof is to the Jurors unknown, of which mortal injuries and sickness to the Jurors unknown, the said KELLY ANN DOBBERT then and there died, contrary to the provisions of Section 782.04, Florida Statutes, and against the peace and dignity of the State of Florida.

SECOND COUNT

And for a second count of this Indictment, the Grand Jurors of the State of Florida and County of Duval empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ERNEST JOHN DOBBERT, JR., of the County of Duval and State of Florida, between the First day of January and the Eighth day of April, both in the year of our Lord One Thousand Nine Hundred and Seventy-Two, in the County and State aforesaid, did commit various assaults upon one RYDER SCOTT DOBBERT and in some way and manner, and by some means, instruments, and weapons to the Jurors unknown, he, the said ERNEST JOHN DOBBERT, JR., did then and there unlawfully, and from a premeditated design to effect the death of the said RYDER SCOTT DOBBERT, inflict and create in the said RYDER SCOTT DOBBERT certain mortal injuries and mortal sickness, a further description whereof is to the Jurors unknown, of which mortal injuries and sickness to the Jurors unknown, the said RYDER SCOTT

DOBBERT then and there died, contrary to the provisions of Section 782.04, Florida Statutes, and against the peace and dignity of the State of Florida.

THIRD COUNT

And for a third count of this Indictment, the Grand Jurors of the State of Florida and County of Duval empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ERNEST JOHN DOBBERT, JR., of the County of Duval and State of Florida, during a period of time from on or about the Twenty-Eighth day of December, in the year of our Lord One Thousand Nine Hundred and Seventy-One until on or about the Eleventh day of April, in the year of our Lord One Thousand Nine Hundred and Seventy-Two, in the County and State aforesaid, did then and there unlawfully and wilfully torture and mutilate and cruelly, wantonly and with malice unlawfully punish and torment HONORE ELIZABETH DOBBERT, and in committing a battery upon the same HONORE ELIZABETH DOBBERT, did intentionally and knowingly cause great bodily harm, permanent disability and permanent disfigurement to the said HONORE ELIZABETH DOBBERT, a child under the age of sixteen (16) years, to-wit: five (5) years of age, contrary to the provisions of Section 828.04(1), Florida Statutes, and against the peace and dignity of the State of Florida.

FOURTH COUNT

And for a fourth count of this Indictment, the Grand Jurors of the State of Florida and County of Duval empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ERNEST JOHN DOBBERT, JR., of the County of Duval and State of Florida, during a period of time from on or about the Twenty-Eighth day of December, in the year of our Lord One Thousand Nine Hundred and Seventy-One until on

or about the Eighth day of April, in the year of our Lord One Thousand Nine Hundred and Seventy-Two, in the County and State aforesaid, did then and there unlawfully and wilfully torture and mutilate and cruelly, wantonly and with malice unlawfully punish and torment ERNEST JOHN DOBBERT, III, and in committing a battery upon the said ERNEST JOHN DOBBERT, III, did intentionally and knowingly cause great bodily harm, permanent disability and permanent disfigurement to the said ERNEST JOHN DOBBERT, III, a child under the age of sixteen (16) years, to-wit: eleven (11) years of age, contrary to the provisions of Section 828.04(1), Florida Statutes, and against the peace and dignity of the State of Florida.

/s/ Ervine C. Hilliard, Jr.
ERVINE C. HILLIARD, JR.
Foreman of the Grand Jury

/s/ HARRY L. SHORSTEIN
HARRY L. SHORSTEIN
Chief Assistant State Attorney, Fourth Judicial Circuit of Florida, In and For Duval County, Prosecuting for said State.

I, HARRY L. SHORSTEIN, Chief Assistant State Attorney, Fourth Judicial Circuit of Florida, In and For Duval County, hereby certify that I, as such Prosecuting Officer and as authorized and required by law, have advised the Grand Jury which returned this Indictment.

/s/ Harry L. Shorstein
HARRY L. SHORSTEIN
Chief Assistant State Attorney

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY, FALL TERM, 1973

Case No. ————

THE STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

INDICTMENT FOR MURDER IN THE FIRST DEGREE AND CHILD TORTURE

A TRUE BILL

/s/ Ervine C. Hilliard, Jr.
Foreman of the Grand Jury

WITNESSES FOR THE STATE

INV. G. H. PARKER
DR. PETER LIPKOVIC

Presented in open Court by the Grand Jury and filed this 8th day of February, 1974.

/s/ S. Morgan Slaughter
S. MORGAN SLAUGHTER
Clerk Circuit Court

By /s/ J. Z. Pearce
J. Z. PEARCE

T. EDWARD AUSTIN
State Attorney

IN THE CIRCUIT COURT OF
DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF DIV: "S"

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

ORDER ON MOTION

The within Motion coming on to be heard in open Court, defendant being present and arguments presented, It Is, Thereupon,

CONSIDERED, ORDERED AND ADJUDGED that said Motion be and the same is hereby the Court rules that this is a capital—death penalty with 12 man jury—

DONE AND ORDERED in open Court this 22 day of February A.D., 1974.

/s/ R. Hudson Olliff
R. HUDSON OLLIFF
Judge

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

MOTION AND AFFIDAVIT FOR CHANGE OF VENUE

Defendant, Ernest John Dobbert, Jr., by and through his undersigned attorney, pursuant to Rule 3.240, Florida Rules of Criminal Procedure, moves this Honorable Court for an order removing this cause to another jurisdiction for trial.

As grounds for this motion, Defendant, being duly sworn, hereby deposes and sets forth:

1. That Defendant stands accused of acts which are inherently odious and subject to inflammatory exploitation by the press and the electronic news media.
2. That the acts of which Defendant stands accused have in fact been widely exploited by the press and the electronic news media to the extent that Duval County, Florida, has become irreparably permeated with prejudicial publicity.
3. That the extensive publicity concerning this Defendant has included detailed accounts of the investigation of the case, a search for bodies by certain members of the Jacksonville Police Department accompanied by television newsmen, the flight of the Defendant, his subsequent extradition and arrest and lengthy speculation concerning the probable development of the factual and legal issues to be decided at trial.
4. That, as a result of the extensive publicity in this case, Defendant has become known by name to the general populace of Duval County and Northeast Florida and that his name has come to be equated with the odious and infamous crime of child torture.

5. That the notoriety of this Defendant has been cited in the local press by an official employed by the Division of Family Services (State Department of Health and Rehabilitative Services) as a causative factor in the documented increase in reported cases of child abuse in Duval County, Florida.

6. That as a direct consequence of this extensive publicity and resulting notoriety, the atmosphere prevailing at this time, and likely to become exacerbated during the period immediately preceeding trial, is so laden with the possibility of prejudice to this Defendant that there is reason to believe that a fair and impartial trial cannot be had in Duval County, Florida.

STATE OF FLORIDA

COUNTY OF DUVAL

Before me, the undersigned authority, personally appeared Ernest John Dobbert, Jr., who being by me duly sworn, says the statements contained in the foregoing Motion for Change of Venue are true and correct according to his best knowledge and belief.

/s/ Ernest John Dobbert
ERNEST JOHN DOBBERT, JR.

SWORN and SUBSCRIBED to before me this 7 day of March, 1974.

/s/ Doyle Glass
DOYLE GLASS
Notary Public

I DO CERTIFY that the foregoing Motion for Change of Venue is made in good faith and not interposed for purposes of delay.

/s/ John Southwood
JOHN SOUTHWOOD
Attorney for Defendant

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

AFFIDAVIT IN SUPPORT OF MOTION FOR CHANGE OF VENUE

STATE OF FLORIDA

COUNTY OF DUVAL

Affiant being duly sworn deposes and says:

1. I am a practicing attorney in Jacksonville, Duval County, Florida, and have been such since 1970. I am currently a member of the firm of Mahon, Farley and Vickers.

2. Throughout my career my practice has consisted of litigative work. I served as Assistant Public Defender from November, 1970, until January of 1972, and as Assistant State Attorney from January, 1972, until March, 1973. Since then my work has regularly included a large amount of criminal defense work. I make it a point to keep current on local attitudes and feelings affecting the ability of local citizens to sit fairly as jurors.

3. I am aware of the extensive publicity which has surrounded the child torture-murder investigation culminating in the indictment of the defendant in the instant case. It has come to my attention through frequent discussions with numerous people concerning this case that local sentiment and feelings are strongly adverse to the defendant in this case and that opinions as to conviction and punishment have been formed as a result of the exposure given the case by the local news media.

4. I believe that, in light of this great media exposure permeating this community concerning both facts

and speculation about the instant case, the name Dobbert has come to be equated with child abuse and child torture and that this defendant cannot therefore receive a fair and impartial trial in Duval County, Florida. I do not believe local jurors with an awareness of this media exposure can expunge from their minds the inference of guilt thereunto appurtaining. I further believe that any remaining qualified jurors who are unaware of the extensive news coverage would not constitute a venire from which a fair cross-section of the defendant's peers in Duval County could be selected.

/s/ Bartley Vickers
BARTLEY VICKERS

SWORN and SUBSCRIBED to before me this 7th day of March, 1974.

/s/ Mary J. Phelps
MARY J. PHELPS
Notary Public

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

AFFIDAVIT IN SUPPORT OF MOTION FOR CHANGE OF VENUE

STATE OF FLORIDA

COUNTY OF DUVAL

Affiant being duly sworn deposes and says:

1. I am a practicing attorney in Jacksonville, Duval County, Florida, and have been such since 1952. I am currently a member of the firm of Lewis, Martin and Carter.

2. Throughout my career my practice has consisted of litigative work. During 1955 and 1956 I was an assistant county solicitor engaged in the prosecution of criminal cases on behalf of Duval County, Florida. Since then my work has regularly included a large amount of criminal defense work. I make it a point to keep current on local attitudes and feelings affecting the ability of local citizens to sit fairly as jurors.

3. I am aware of the extensive publicity which has surrounded the child torture-murder investigation culminating in the indictment of the defendant in the instant case. It has come to my attention through frequent discussions with numerous people concerning this case that local sentiment and feelings are strongly adverse to the defendant in this case and that opinions as to conviction and punishment have been formed as a result of the exposure given the case by the local news media.

4. I believe that, in light of this great media exposure permeating this community concerning both facts and speculation about the instant case, the name Dobbert has come to be equated with child abuse and child torture and that this defendant cannot therefore receive a fair and impartial trial in Duval County, Florida. I do not believe local jurors with an awareness of this media exposure can expunge from their minds the inference of guilt thereunto appurtaining. I further believe that any remaining qualified jurors who are unaware of the extensive news coverage or who are unaffected by prior information or opinions surrounding this case and this defendant would not constitute a venire from which a fair cross-section of the defendant's peers in Duval County could be selected.

/s/ Giles Lewis
GILES LEWIS

SWORN and SUBSCRIBED to before me this 6th day of March, 1974.

/s/ Mary J. Phelps
MARY J. PHELPS
Notary Public

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

AFFIDAVIT IN SUPPORT OF MOTION FOR CHANGE OF VENUE

STATE OF FLORIDA

COUNTY OF DUVAL

Affiant being duly sworn deposes and says:

1. I am a practicing attorney in Jacksonville, Duval County, Florida, and have been such since 1962. I am a member of the firm of Datz, Jacobson and Dusek.

2. Throughout my career my practice has consisted of litigative work. From July, 1962, through December, 1964, I served as Assistant United States Attorney for the Southern and Middle Districts of Florida. Since then my work has regularly included a large amount of criminal defense work. I make it a point to keep current on local attitudes and feelings affecting the ability of local citizens to sit fairly as jurors.

3. I am aware of the extensive publicity which has surrounded the child torture-murder investigation culminating in the indictment of the defendant in the instant case. It has come to my attention through frequent discussions with numerous people concerning this case that local sentiment and feelings are strongly adverse to the defendant in this case and that opinions as to conviction and punishment have been formed as a result of the exposure given the case by the local news media.

4. I believe that, in light of this great media exposure permeating this community concerning both facts and speculation about the instant case, the name Dobbert has come to be equated with child abuse and child torture and that this defendant cannot therefore receive a fair and impartial trial in Duval County, Florida. I do not believe local jurors with an awareness of this media exposure can expunge from their minds the inference of guilt thereunto appurtaining. I further believe that any remaining qualified jurors who are unaware of the extensive news coverage or who are unaffected by prior information or opinions surrounding this case and this defendant would not constitute a venire from which a fair cross-section of the defendant's peers in Duval County could be selected.

/s/ Samuel S. Jacobson
SAMUEL S. JACOBSON

SWORN and SUBSCRIBED to before me this 6th day of March, 1974.

/s/ Albert J. Datz
ALBERT J. DATZ
Notary Public

Notary Public, State of Florida at Large, My Commission Expires Dec. 1, 1977, Bonded by American Fire & Casualty Co.

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

ORDER

This Court now has pending before it a Motion for Change of Venue and hearing will be held on such Motion on Friday, March 15, 1974. That said Motion for Change of Venue is based in whole or in part upon various news media stories about this case.

That it is the concern and obligation of this Court in this and in every criminal case to see that the defendant is accorded a fair trial and in furtherance of that obligation this Court has entered the following Order which is binding upon everyone occupying an official position having to do with this case and this includes the State Attorney, and all of his assistants and employees, the Sheriff and all of his deputies and employees, the Clerk of the Circuit Court and all of his deputies and employees, the Public Defender and all of his assistants and employees, the defendant, all of the officers of this Court, the witnessees for the State and the defense and anyone else connected with this case.

That none of the named persons will release any statement about this case to any news media at any time before or during this trial until it shall have been completed and disposed of.

This order does not prohibit the giving by anyone of the date and time of Court hearings or the time and date of the trial.

Copies of this order will immediately be served upon the State Attorney, the Public Defender, the Clerk of the

Circuit Court, the Sheriff and the witnesses as they come before the Court, and shall be binding upon each of them, their assistants, agents, deputies, and employees and for any violation hereof there will be proceedings in criminal contempt.

DONE and ORDERED in Chambers at Jacksonville, Duval County, Florida, this the 12th day of March, 1974.

/s/ R. Hudson Olliff
R. HUDSON OLLIFF
Circuit Judge

IN THE FOURTH CIRCUIT COURT OF
DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF DIV: "S"

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

ORDER ON MOTION AND AFFIDAVIT FOR
CHANGE OF VENUE

The within Motion coming on to be heard in open Court, defendant being present and arguments presented, It Is, Thereupon,

CONSIDERED, ORDERED AND ADJUDGED that said Motion be and the same is hereby Motion under advisement, after one day of testimony & evidence, till it is determined from jury selection—if it possible to get a fair & impartial jury.

DONE AND ORDERED in open Court this 15 day of A.D., 1974.

/s/ R. Hudson Olliff
R. HUDSON OLLIFF
Judge

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT

ADVISORY SENTENCE

We, a majority of the jury, rendering an advisory sentence to the Court as to whether the defendant should be sentenced to death or to life imprisonment, find:

1. Sufficient aggravating circumstances
   do not
   exist to justify a sentence of death.
2. Sufficient mitigating circumstances
   do
   exist, which outweigh any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death.
3. Based on those considerations, the defendant should be sentenced to
   life imprisonment

DATED: 3-30-, 1974.

/s/ Gary D. Thomas
GARY D. THOMAS
Foreman/Forewoman

/s/ Joyce L. Green
JOYCE L. GREEN

/s/ W. F. Dan Ane
W. F. DAN ANE

/s/ Rufus Williams
RUFUS WILLIAMS

/s/ Betty J. Price
BETTY J. PRICE

/s/ Jacquelynn R. Fernandez
JACQUELYNN R. FERNANDEZ

/s/ Teresa Wright
TERESA WRIGHT

/s/ Michael Gladin
MICHAEL GLADIN

/s/ Maxine Royster
MAXINE ROYSTER

/s/ T .H. Youngblood
T. H. YOUNGBLOOD

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

MOTION FOR NEW TRIAL

Comes now the Defendant, by and through his undersigned attorney, and pursuant to Rules 3.590 and 3.600 Rules of Criminal Procedure, respectfully moves this Honorable Court to order a new trial for the Defendant in the above styled cause on the following grounds:

1. The Court erred in denying the Defendant's Motion for Judgment of Acquittal made at the close of the State's case.
2. The Court erred in denying the Defendant's Motion for Judgment of Acquittal made at the close of all the evidence.
3. The verdicts are against the weight of the evidence.
4. The verdicts are contrary to the law.
5. The verdicts are contrary to the evidence.
6. The Defendant could not and did not receive a fair and impartial trial due to extensive pre-trial publicity which permeated the entire jury venire and the Court erred in denying the Defendant's Motions for Change of Venue.
7. The Defendant could not and did not receive a fair and impartial trial on each of the four counts because the Court erred in denying Defendant's pre-trial Motion for Severance which was renewed at the close of the State's case.
8. The Court erred in failing to require the State to respond with greater particularity to Defendant's Motion for Statement of Particulars.

9. The Court erred in allowing the State to introduce evidence of collateral crimes prior to introduction of evidence to prove the corpus delecti.
10. The Court erred in allowing the State to introduce evidence of collateral crimes.
11. The Court erred in allowing the State to introduce admissions, statements, and confessions of the Defendant prior to introduction of evidence to prove corpus delecti.
12. The Court erred in allowing the introduction of hearsay evidence on the premise that hearsay is admissible if said in the presence of the Defendant.
13. The Court erred in allowing the State to propound hypothetical questions to experts based on facts not in evidence.
14. The Court erred in allowing the State to introduce photographs of one victim, Ernest John Dobbert III, said photographs being inflammatory and serving no relevant purpose.
15. The Court erred in denying the Defendant's Motion to Suppress Evidence.
16. The Court erred in denying Defendant's requested Jury Instructions on the First and Second Count as to attempted murder in all four degrees, aggravated assault, aggravated battery, and assault and battery.
17. The Court erred in denying Defendant's requested Jury Instructions on the Third and Fourth Count as to aggravated assault, aggravated battery, and assault and battery.

WHEREFORE, the Defendant prays that this Honorable Court will order a new trial in this cause.

Respectfully submitted

LOUIS O. FROST, JR.
Public Defender

By /s/ John Southwood
JOHN D. SOUTHWOOD
Chief Assistant Public Defender

[Certificate of Service Omitted in Printing]

IN THE CIRCUIT COURT OF
DUVAL COUNTY, FLORIDA

Case No. 73-5068 CF DIV: "S"

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

ORDER ON MOTION FOR NEW TRIAL

The within Motion coming on to be heard in open Court, defendant being present and arguments presented, It Is, Thereupon,

CONSIDERED, ORDERED AND ADJUDGED that said Motion be and the same is hereby denied—after argument in open Court.

DONE AND ORDERED in open Court this 12 day of April, A.D., 1974.

/s/ R. Hudson Olliff
R. HUDSON OLLIFF
Judge

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

Case No. 73-5068 Division S

STATE OF FLORIDA

vs.

ERNEST JOHN DOBBERT, JR.

SENTENCE

The defendant was indicted for the crimes of Murder in the First Degree of Kelly Ann Dobbert, age 9, and Ryder Scott Dobbert, age 7, and the Child Torture of Honore Elizabeth Dobbert, age 5 and Ernest John Dobbert, III, age 11.

The Jury found the defendant guilty of Murder in the First Degree of Kelly Ann Dobbert, Guilty of Murder in the Second Degree of Ryder Scott Dobbert, Guilty of Child Torture of Ernest John Dobbert, III, and Guilty of Child Abuse of Honore Elizabeth Dobbert.

The Court having heard all of the evidence in this case, and having heard and denied Motion for a New Trial, does hereby adjudge the defendant guilty of each of the counts of which he has been found guilty and sentences him as follows:

A. As to the crimes of Murder in the Second Degree, Child Torture and Child Abuse, I hereby impose the maximum sentence on each count. These sentences are to run consecutively each to the other.

B. The sentences imposed in the case above of Murder in the Second Degree, Child Torture and Child Abuse are to be served consecutive with the sentence which the Court imposes below for the crime of Murder In The First Degree. Ordinarily it would be a useless act to run sentences for Murder in the Second Degree, Child Torture and Child

Abuse consecutive to the maximum sentence for Murder In The First Degree. This is done in this case for the reason that there are now before the Courts legal challenges to the maximum penalty in first degree murder cases. Should such challenges prevail this Court would re-impose the maximum possible sentence for Murder in the First Degree and run the sentences for Murder in the Second Degree, Child Torture and Child Abuse consecutive thereto.

Before imposing the sentence for Murder in the First Degree the Court has closely examined and written its findings as to each of the elements of aggravation and/or mitigation which are set forth in Florida Statutes and which were guide-lines for the Jury in considering its Advisory Sentence.

The Court has summarized the facts as brought out in the trial and in the pre-sentence investigation report and applied them to each element of aggravation and/or mitigation where such elements are applicable.

In summarizing these elements of aggravation and/or mitigation, the Court has listed them in reverse order as follows:

MITIGATING CIRCUMSTANCES

A. WHETHER DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

FACT:

That on 9-20-65 the Police of St. Francis, Wisconsin, arrested the defendant for "Battery—Child", in that he "struck Ernest John Dobbert, III, age 5 years, several times causing a black eye, a large bruise on the upper forehand and red swollen cheeks and nose."

The Judge of that Court sent the defendant to a Hospital for mental observation and placed him on one year probation.

FACT:

That on 11-17-67 the Police of St. Francis, Wisconsin, arrested the defendant on the charge of "Assault", in that instance the report states that the defendant "disciplined his son, Ernest John Dobbert, III, for poor grades by burning his hands over an open flame on a gas range."

The defendant was found guilty and incomprehensibly the Judge of that Court only fined the defendant $50.00 and imposed no further punishment. This was only two years after he had been placed on probation for battery on Little John in 1965.

FACT:

The evidence and testimony of John III and neighbors at the trial and the defendant's own written statement was that he was constantly beating the children with fists, boards and other objects and was seen kicking, chocking and beating Kelly Ann Dobbert, Ryder Scott Dobbert, Ernest John Dobbert, III and Honore Elizabeth Dobbert. The neighbors made their complaints to the Police and Social Welfare Agencies, but the defendant was able to avoid a thorough investigation of the charges by deceit, lies and by the murder of Kelly Ann and Ryder Scott Dobbert.

CONCLUSION:

There is no mitigating circumstance under this paragraph because there was a significant history of prior criminal activity towards the children in both Wisconsin and Jacksonville, Florida.

B. WHETHER THE MURDER WAS COMMITTED WHILE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

FACT:

The defendant did not testify, however, his written statement did indicate that he thought he was under an emotional strain. However, that statement was more of a recitation of torture of the children than the establishment of any emotional strain.

FACT:

The defendant was examined by two psychiatrists and a psychologist prior to trial and found to be sane and competent at the time of examination and at the time of the crimes. The psychiatrists both stated that at the time of the crime he understood the nature, quality and wrongfulness of his acts, and knew right from wrong and was able to adhere to the right. Neither the psychiatrists or psychologist found or reported that he was under the influence of extreme mental or emotional disturbance at the time of the crimes.

CONCLUSION:

There is no mitigating circumstance under this paragraph because there is little, if any, evidence that defendant was under the influence of extreme mental or emotional disturbances at the time of the crimes. Perhaps the best description of his emotional state then, and at the time of the crime was given by the psychiatrist, Dr. Ernest Miller, in his written report of November 8, 1973, in which he said:

"Mr. Dobbert is an immature, egocentic individual, hedonistic and basically insensitive to the real needs of other persons, given to impulsive behavior designed to provide immediate gratification for himself." The Doctor went on to say, "defect in conscience is also apparent, both punitive and preventive components being either attenuated or absent altogether."

C. WHETHER THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.

FACT:

The defendant murdered his own nine year old daughter, Kelly Ann Dobbert by continuous beatings, kicking, hitting with fist and other objects, choking, sewing up her cuts with needle and thread and other torture and depriving her of medical care and finally murdered her, placed her body in a plastic garbage bag and buried here in an unknown and unmarked grave.

CONCLUSION:

There is no mitigating circumstance under this paragraph because the defendant murdered his own 9 year old child—who could not have voluntarily participated or consented to it.

D. WHETHER THE DEFENDANT WAS AN ACCOMPLICE IN THE MURDER COMMITTED BY ANOTHER PERSON, AND THE DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR.

FACT:

The evidence at the trial showed that defendant alone did the murder. It showed that his wife was in jail in Wisconsin and his Mother was also in Wisconsin and that he was the only adult living in the home. The facts also proved that defendant locked the children inside the home during his

absence and confined them to the house when he was present with them and that he actively prevented outsiders, by lies, and subterfuge, from entering the home. The only evidence of torture, beatings and murder were those done by the defendant alone.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

E. WHETHER THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

FACT:

No element of duress was ascertained by the psychiatrists as set forth in paragraph B. above. There is absolutely no testimony of duress in any degree which would justify the hideous crimes of which he was convicted. If, he suffered duress over the care and welfare of the children, there was help available but he turned away both Police and Family Services Workers before the murder of Kelly Ann and Ryder Scott Dobbert by lies and deception and by pretending all in the home were well and normal.

FACT:

There was no evidence that defendant was under substantial domination of another person. His wife was alternately in jail in Jacksonville, and Wisconsin for worthless checks and his mother was also in Wisconsin and he had no other relative in Jacksonville. While his wife was in the City Prison Farm in Jacksonville she caused the police to visit the Dobbert home to see to the welfare of the children because on a visit the defendant told her of the injuries suffered by the children and his punishment of them. Her influence, if any, was for him to look after and protect the children.

From a reading of the pre-sentence investigation report which is attached hereto as EXHIBIT #1.

It appears that his wife was under his domination to do criminal acts (cash worthless checks) for which she was later jailed.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

F. WHETHER THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

FACT:

As stated in paragraph B above, both psychiatrists made written reports to this Court that defendant was competent, sane and able to understand the nature, quality and wrongfulness of his acts both at the time of crime and at the time of examination, and able to adhere to the right.

By Order of this Court the defendant was examined by Dr. Ernest Miller, M. D., an experienced psychiatrist practicing in Jacksonville, Florida, with years of experience in examining persons charged with crimes. Dr. Miller has testified as an expert in psychiatry in this Court and other Courts in this County and throughout the State of Florida. Dr. Helen Byrd, Staff Psychologist of the Community Mental Health Center—made psychological testings of Mr. Dobbert at the request of Dr. Miller.

Dr. George Bernard, M. D., Psychiatrist, at the University of Florida J. Hillis Miller Medical Center in Gainesville, Florida, with years of experience in examing persons charged with crimes and who has testified in this Court and other Courts of the State as a expert in his field.

Excerpts of their findings are set forth below, and copies of their entire reports are attached hereto as EXHIBITS 2, 3 and 4.

Dr. Miller reported that "Mental status, neurological, psychological and electroencephalographic examinations reveal no evidence of discreet or diffuse disease of the brain or of a significant disturbance in cognition, reality testing, reasoning or emotional control." The Doctor further stated that "his general fund of information is good. RAIT assessment places the intelligence at approximately 107 on the Wechsler Scale, which is in the average range. He is able to register, recall and retain information adequately. His verbal and mathematical abstractive ability is excellent, as indicated by his responses to word association tests and proverb analysis."

Dr. Miller concluded his report by stating that:

"In my opinion, the patient is at the present time mentally competent to proceed with trial, able to understand the charges facing him and to adequately assist counsel in his own defense. It is my opinion, as well, that at the time of the alleged offense the patient was mentally competent, able to understand the nature, quality and wrongfulness of his acts." "MR. DOBBERT IS AN IMMATURE, EGOCENTRIC INDIVIDUAL, HEDONISTIC AND BASICALLY INSENSITIVE TO THE REAL NEEDS OF OTHER PERSONS, GIVEN TO IMPULSIVE BEHAVIOR DESIGNED TO PROVIDE IMMEDIATE GRATIFICATION FOR HIMSELF. PASSIVE-AGGRESSIVE AND MANIPULATIVE MECHANISMS ARE ALSO EMPLOYED, AS WELL AS

HIS TENDENCY TO RATIONALIZE, DENY AND PROJECT ONTO OTHER PERSONS RESPONSIBILITY FOR HIS OWN DIFFICULTIES. DEFECT IN CONSCIENCE IS ALSO APPARENT, BOTH PUNITIVE AND PREVENTATIVE COMPONENTS BEING EITHER ATTENUATED OR ABSENT ALTOGETHER."

Dr. Byrd reported that "When asked the standardized questions regarding how he would act in a social situation, he would ask if the question meant to give the practical sensible response or what he would actually do. There was indeed a difference in that for the most part he knows what behavior is socially acceptable, but he is more apt to respond in a way which satisfies his drive. He was not the least bit hesitant to indicate his thoughts as opposed to the mores of society at large, nor did he give any evidence that he should have some feeling of guilt in opposing the moral code of the majority." Dr. Byrd concluded that "Two things clearly indicated by his responses were the absence of thought disorder and the ability to exercise rational, critical control over basic impulses when he perceives that allowing their expression, even verbally, might work to his advantage."

Dr. Bernard reported that "It is my medical opinion the prisoner is competent and able to assist counsel in the preparation of his defense. It is also my medical opinion he was competent at the time of the alleged crime, knowing right from wrong and being able to adhere to the right."

FACT:

The defendant did not testify nor did he produce any witnesses in his own behalf and there was absolutely no evidence that his capacity to appreciate the criminality of his conduct or to

conform it to law was substantially impaired. The fact is, that just the opposite was true as shown by the reports of the experts who examined him.

CONCLUSION:

There is no mitigating circumstance under this paragraph because the expert opinions agree that he was mentally competent and able to understand the nature, quality and wrongfulness of his acts at the time of the crimes and had average intelligence.

G. THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

FACT:

The defendant was born February 26, 1938, and was 33 years of age at the time of the murder of Kelly Ann Dobbert. He was a six foot-two inch white male weighing approximately two hundred and ten pounds. The report of the doctors showed that he was physically mature with average intelligence and without any impaired reasoning process.

CONCLUSION:

There is no mitigating circumstance under this paragraph. The defendant was a man of mature physical and mental years and of average intelligence.

CONCLUSION OF COURT

There are no mitigating circumstances existing—either statutory or otherwise—which outweighs any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death.

The Court now summarizes the facts brought out in trial and the pre-sentence investigation and applies them to the elements of aggravation which were considered by the Jury in arriving at their Advisory Sentence.

AGGRAVATING CIRCUMSTANCES

A. WHETHER THE DEFENDANT WAS UNDER SENTENCE OF IMPRISONMENT WHEN HE COMMITTED THE MURDER OF WHICH HE WAS CONVICTED.

FACT:

The defendant was not imprisoned at the time of the murder. He did actually prevent arrest, prosecution and imprisonment for his crime by terrorizing and brutalizing his victims and by lies and deception towards the Police and Social Agencies.

FACT:

The defendant had previously been twice arrested and found guilty of crimes against one of his children in Wisconsin in 1965 and 1967 (see paragraph A, under Mitigating Circumstances above herein.)

CONCLUSION:

This is an aggravating circumstance because although defendant was not imprisoned at the time of the murder—he had been previously convicted of crimes against child and he prevented arrest, prosecution and imprisonment by lies, deception and murder.

B. WHETHER THE DEFENDANT HAS PREVIOUSLY BEEN CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OF THREAT OF VIOLENCE TO THE PERSON.

FACT:

That on 9-20-65 the Police in St. Francis, Wisconsin, arrested the defendant on the charge of "Assault", in that instance the report states the defendant "Disciplined his son, Ernest John Dobbert, III, for poor grades by burning his hands over an open flame on a gas range."

FACT:

That on both the Wisconsin charges he was found guilty. Whether the crimes were misdemeanors or felonies in Wisconsin—is not known to this Court. The point is—that such crimes did involve the use of violence to another person—a helpless 5 year old child.

FACT:

The evidence of little John III, the neighbors at trial were that in the past the defendant had committed crimes of violence against the children by constantly beating them with fists, boards and other objects and was seen hitting, kicking, choking, and beating Kelly Ann Dobbert, Ryder Scott Dobbert, Ernest John Dobbert, III, and Honore Elizabeth Dobbert. The fact that he was not previously convicted of these felonies should not be seriously considered because he terrorized, brutalized and generally prevented detection by secreting helpless children over whom he had absolute control.

CONCLUSION:

There is an aggravating circumstance here because defendant was previously convicted of crimes of violence against children had prevented further conviction of a felony by his tyrannical control over the victims of his crimes.

C. WHETHER, IN COMMITTING THE MURDER OF WHICH HE HAS JUST BEEN CONVICTED, THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

FACT:

After the defendant murdered Kelly Ann Dobbert—he murdered Ryder Scott Dobbert and the defendant also tortured and abused the other children.

CONCLUSION:

There is an aggravating circumstance under this paragraph because not only did the defendant's murder of Kelly Ann knowingly create great risk of death to others—it was followed by the murder of Ryder Scott. A great risk of death was also created by defendant towards the two surviving children.

D. WHETHER THE MURDER OF WHICH DEFENDANT WAS CONVICTED WAS COMMITTED WHILE HE WAS ENGAGED IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING, AIRCRAFT PIRACY, OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

This does not seem to be applicable to the circumstances of this case.

E. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

FACT:

The evidence and testimony showed that defendant constantly beat Kelly Ann Dobbert, kicked and hit her with fists and other objects—caused her to be violently and chronically ill from such torture and that she was scarred, battered and bruised. That to prevent her condition from being known to the authorities, the defendant locked her inside the home in his absence, confined her to the house when he was present and finally murdered her, placed her body in a plastic garbage bag and buried her in an unknown and unmarked grave. All of which was done to prevent discovery of her condition and to avoid his arrest.

CONCLUSION:

There is an aggravating circumstance here in that he did the murder of his daughter to avoid and prevent his arrest.

F. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR PECUNIARY GAIN.

FACT:

This does not seem applicable to the present case.

G. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS:

FACT:

This does not seem to be applicable to the facts in the present case except as it refers to hinder enforcement of laws, and that aspect has been

covered above—where his efforts to avoid arrest by murder, have been enumerated.

H. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

FACT:

The defendant stands convicted of first degree murder of his 9 year old daughter, Kelly Ann Dobbert, second degree murder of his 7 year old son, Ryder Scott Dobbert, torture of his 11 year old son, Ernest John Dobbert, III, and child abuse of his then 5 year old daughter, Honore Elizabeth Dobbert.

FACT:

The evidence and testimony showed premeditated and continuous torture, brutality, sadism and unspeakable horrors committed against all of the children over a period of time. The crimes were committed against the children constantly and it is difficult to separate the specific acts against the individual child. What was done to one—short of causing blindness and murder—was done to all. However, the Court has set forth below some of the cruel and brutal acts against Kelly Ann—in so far as trial notes and memory of testimony serve me correctly.

Over the period of time of the latter portion of Kelly Ann's short, tortuous life the defendant did these things to her on one or many occasions:

1. Beat her in the head until it was swollen.
2. Burned her hands.
3. Poked his fingers in her eyes.
4. Beat her in the abdomen until "it was swollen like she was pregnant."

5. Knocked her against a wall and "when she fell, kicked her in the lower part of the body."
6. Held her under water in both the bath tub and toilet.
7. Kicked her against a table which cut her head—then defendant sewed up her wound with needle and thread.
8. Scarred her head and body by beating her with a belt and board—causing marks from her cheek, across the neck and down her back—which injuries worsened without treatment "until the body juices came out".
9. On one occasion beat her continuously for 45 minutes.
10. On many occasions kicked her in the stomach with his shoes on, and on the night she died he kicked her a number of times.
11. Kept her out of school so that the many scars, cuts and bruises on her body would not be seen by others.
12. Defendant made no effort to get professional medical care and attention for the child and in fact actively prevented any out-siders from discovering her condition.
13. Choked her on the night she died and when she stopped breathing he placed her body in a plastic garbage bag and buried her in an unmarked and unknown grave.

CONCLUSION:

The murder of which the defendant has been convicted was especially heinous, atrocious and cruel. If it is not—then what crime is?

CONCLUSION OF THE COURT

There are sufficient and great aggravating circumstances which exist to justify the sentence of death.

In concluding my findings I would like to point out that my 22 years of legal experience have been almost exclusively in the field of criminal law.

The Judge of this Court has been a defense attorney of criminal cases, a prosecutor for eight and one half years and a Criminal Court Judge and a Circuit Judge—Felony Division for three and one half years.

During this 22 years I have defended, prosecuted and held trial of almost every type of serious crime. During these years of legal experience I have never known of a more heinous, atrocious and cruel crime than this one.

My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. During World War II, I was a United States Army Paratrooper and served overseas in ground combat. I have had friends blown to bits and have seen death and suffering in every concievable form.

I am not easily shocked or effected by tragedy or cruelty—but this murder of a helpless, defenseless and innocent child is the most cruel, atrocious and heinous crime I have every personally known of—and it is deserving of no sentence but death.

Having adjudged you guilty of Murder in the First Degree I hereby sentence you to death. I order that you be taken by the proper authorities to the Florida State Prison and there kept in close confinement until the date of your execution be set. That on such day you be put to death by having electrical currents passed through your body in such amounts and frequency until you are rendered dead.

I advise you that you have thirty days from today to take an appeal from the sentences which I have just imposed upon you and I hereby appoint the

Public Defender's Office to represent you on the appeal.

May God have mercy upon your soul.

DONE and ORDERED and SENTENCED in Open Court at the Duval County Courthouse, Jacksonville, Florida, on this the 12th day of April, 1974.

/s/ R. Hudson Olliff
R. HUDSON OLLIFF
Circuit Judge

SUPREME COURT OF FLORIDA

No. 45558

Jan. 14, 1976

ERNEST JOHN DOBBERT, JR., APPELLANT

v.

STATE OF FLORIDA, APPELLEE

REHEARING DENIED APRIL 5, 1976

By a judgment of the Circuit Court, Duval County, R. Hudson Olliff, Jr., the defendant was convicted of first-degree murder, second-degree murder, child torture and child abuse and he appealed. The Supreme Court held that there was no reversible error in failing to charge on attempted homicide, that trial judge who did everything possible to insure an impartial trial for defendant did not abuse discretion in denying motion for change of venue and that trial court after considering all the mitigating and aggravating circumstances properly imposed death penalty for the murder conviction.

Affirmed.

Boyd, J., filed a dissenting opinion.

England, J., filed an opinion concurring in part and dissenting in part.

Overton, J., filed an opinion concurring specially.

1. Criminal Law—795(1)

Under Criminal Procedure Rule relating to giving of charge on attempt, trial judge must determine in every case as a matter of law whether an attempt to commit crimes charged would itself constitute an offense under Florida law, and if he determines that it does, then he must instruct jury on the subject of such attempt and jury may find him guilty accordingly, regardless of whether accusatory pleading specifically charges an at-

tempt and even though in opinion of trial judge proof established guilt of crime charged rather than a mere attempt to commit it. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.510.

2. Homicide—341

Where trial judge instructed jury on murder in the first, second, and third degrees as well as manslaughter and justifiable and excusable homicide and further stated that if jury returned a verdict of guilty it should be for the highest offense which has been proved beyond reasonable doubt, trial judge did not commit reversible error in failing to instruct on attempted homicide in prosecution in which jury returned a first-degree conviction. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.510.

3. Criminal Law—121

Trial judge who did everything possible to insure an impartial trial for defendant, charged with two counts of murder and two counts of child torture, by allowing careful and extensive examination by defense counsel, by sequestering jury and by placing a comprehensive gag order on all participants of trial did not abuse discretion in denying motion for change of venue.

4. Homicide—354

Upon considering all the mitigating and aggravating circumstances and upon careful review of entire record showing defendant's history of child abuse and torture, trial court properly imposed death penalty on defendant for the first-degree murder of his child.

Louis O. Frost, Jr., Public Defender, James O. Brecher and Steven E. Rohan, Asst. Public Defenders, for appellant.

Robert L. Shevin, Atty. Gen., Harry L. Shorstein, Sp. Asst. Atty. Gen., and Carolyn M. Snurkowski, Asst. Atty. Gen., for appellee.

PER CURIAM.

Appellant was indicted on two counts of murder in the first degree and two counts of child torture in that he did commit various assaults upon Kelly Ann Dobbert including kicking, choking, and torturing her with his hands and feet and by use of other instruments and weapons and that from a premeditated design to effect death, he inflicted mortal injuries upon Kelly Ann which resulted in her death; in that he committed various assaults upon Ryder Scott Dobbert and from premediated design to effect Ryder Scott's death, he inflicted mortal injuries resulting in Ryder Scott's death; in that he willfully tortured, mutilated, cruelly, wantonly and maliciously punished and tormented Honore Elizabeth Dobbert, a child, five years of age, and in committing battery upon her did intentionally and knowingly cause great bodily harm, permanent disability and permanent disfigurement to Honore; and in that he willfully tortured, mutilated, cruelly, wantonly, maliciously, and unlawfully punished and tormented Ernest John Dobbert, III, which caused serious bodily harm, permanent disability and permanent disfigurement to Ernest John, III, a child of eleven years of age. Appellant moved to dismiss the indictment which motion was denied as to counts one and two charging murder in the first degree but was granted as to counts three and four charging child torture. Subsequently, the Grand Jury returned an amended indictment charging two counts of murder in the first degree and two counts of child torture. A motion by appellant to sever counts one and two from the indictment was denied. Appellant filed a motion and affidavit for change of venue which alleged, inter alia, that defendant stands accused of acts inherently odious and subject to inflammatory exploitation by the press and that as a consequence of extensive publicity, the possibility of prejudice to him was great. The trial court, before ruling on a change of venue, entered an order which he stated was binding upon everyone occupying an official position having to do with this case including the State Attorney, and all of his assistants and employees, the Sheriff and all of his deputies and employees, the Clerk of the

Circuit Court and all of his deputies and employees, the public defender and all of his assistants and employees, the defendant, all of the officers of this court, the witnesses for the State and the defense and anyone else connected with this case. Thereby, he orderd that none of the named persons will release any statement about this case to any news media at any time before or during this trial until it shall have been completed and disposed of. After hearing, he then took the motion for change of venue under advisement until after jury selection was attempted.

Pursuant to Rule 3.152(a)(2)(i), F.Cr.P.R., appellant moved to sever each of the four counts of the indictment, which motion was denied. The jury was selected, after which the judge denied the motion for change of venue. A lengthy trial was held, after which the jury returned verdicts of guilty of murder in the first degree of Kelly Ann Dobbert, guilty of murder in the second degree of Ryder Scott Dobbert, guilty of child torture of Ernest John Dobbert, III, and guilty of child abuse of Honore Elizabeth Dobbert. The jury returned an advisory sentence finding that sufficient aggravating circumstances did not exist to justify a sentence of death and that sufficient mitigating circumstances exist to warrant imposition of a life sentence. Motion for new trial was denied and defendant was adjudicated guilty of each of the four counts of which he was found guilty.

The trial court imposed the maximum penalties for the crimes of murder in the second degree, child torture, and child abuse, which sentences are to run consecutively and total forty-six years;[1] and after closely examining

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[1] As explanation for the imposition of consecutive sentences, the trial judge stated: "The sentences imposed in the case above of Murder in the Second Degree, Child Torture and Child Abuse are to be served consecutive with the sentence which the court imposes below for the crime of Murder In The First Degree. Ordinarily it would be a useless act to run sentences for Murder in the Second Degree, Child Torture and Child Abuse consecutive to the maximum sentence for Murder In The First Degree. This is done in this case for the reason that there are now before the Courts legal challenges to the maximum penalty in first degree murder cases. Should such challenges prevail this Court would reimpose the maximum possible sentence for Murder in the First Degree and run the sentences for Murder in the Second Degree, Child Torture and Child Abuse consecutive thereto."

and writing extensive findings as to each of the elements of aggravation and/or mitigation set out by law, the trial judge imposed the sentence of death for the first degree murder. He analyzed each individual mitigating and aggravating factor in detail and gave full explanation for his decision to impose the death penalty. Because of their importance to the decision of this cause, the findings enumerated by the trial judge must be set out herein. Relative to the mitigating circumstance of whether the defendant has no significant history of prior criminal activity, the trial court found as follows:

> "FACT:
>
> That on 9-20-65 the Police of St. Francis, Wisconsin, arrested the defendant for 'Battery—Child', in that he 'struck Ernest John Dobbert, III, age 5 years, several times causing a black eye, a large bruise on the upper forehand and red swollen checks and nose.'
>
> "The Judge of that Court sent the defendant to a Hospital for mental observation and placed him on one year probation.
>
> "FACT:
>
> "That on 11-17-67 the Police of St. Francis, Wisconsin, arrested the defendant on the charge of 'Assault', in that instance the report states that the defendant 'disciplined his son, Ernest John Dobbert, III, for poor grades by burning his hands over an open flame on a gas range.'
>
> "The defendant was found guilty and incomprehensively the Judge of that Court only fined the defendant $50.00 and imposed no further punishment. This was only two years after he had been placed on probation for battery on Little John in 1965.

"FACT:

"The evidence and testimony of John III and neighbors at the trial and the defendant's own written statement was that he was constantly beating the children with fists, boards and other objects and was seen kicking, choking and beating Kelly Ann Dobbert, Ryder Scott Dobbert, Ernest John Dobbert, III and Honore Elizabeth Dobbert. The neighbors made their complaints to the Police and Social Welfare Agencies, but the defendant was able to avoid a thorough investigation of the charges by deceit, lies and by the murder of Kelly Ann and Ryder Scott Dobbert.

"CONCLUSION:

"There is no mitigating circumstances under this paragraph because there was a significant history of prior criminal activity towards the children in both Wisconsin and Jacksonville, Florida."

Relative to the mitigating circumstance of whether the murder was committed while defendant was under the influence of extreme mental or emotional disturbance, the trial judge determined:

"FACT:

The defendant did not testify, however, his written statement did indicate that he thought he was under an emotional strain. However, that statement was more of a recitation of torture of the children than the establishment of any emotional strain.

"FACT:

The defendant was examined by two psychiatrists and a psychologist prior to trial and found to be sane and competent at the time of examination and at the time of the time of the crimes. The psychiatrists both stated that at the time of the crime he understood the nature, quality and wrongfulness of his acts, and knew right from wrong and was able to adhere to the right. Neither the psychiatrists or psychologist found or reported that he was under

the influence of extreme mental or emotional disturbance at the time of the crimes."

and concluded that there is no mitigating circumstance under this paragraph. The trial judge determined that the mitigating factor of whether the victim was a participant in the defendant's conduct or consented to the act did not exist since "The defendant murdered his own nine year old daughter, Kelly Ann Dobbert by continuous beatings, kicking, hitting with fist and other objects, choking, sewing up her cuts with needle and thread and other torture and depriving her of medical care and finally murdered her, placed her body in a plastic garbage bag and buried her in an unknown and unmarked grave." As to the mitigating circumstance of whether the defendant was an accomplice in the murder committed by another person, the trial judge found:

"FACT:

"The evidence at the trial showed that defendant alone did the murder. It showed that his wife was in jail in Wisconsin and his Mother was also in Wisconsin and that he was the only adult living in the home. The facts also proved that defendant locked the children inside the home during his absence and confined them to the house when he was present with them and that he actively prevented outsiders, by lies, and subterfuge, from entering the home. The only evidence of torture, beatings and murder were those done by the defendant alone."

As to question of whether defendant acted under extreme duress or under the substantial domination of another, the trial court determined:

"FACT:

"No element of duress was ascertained by the psychiatrists as set forth in paragraph B above. There is absolutely no testimony of duress in any degree which would justify the hideous crimes of which he was convicted. If, he suffered duress over the care and welfare of the children, there was help available

but he turned away both Police and Family Services Workers before the murder of Kelly Ann and Ryder Scott Dobbert by lies and deception and by pretending all in the home were well and normal.

"FACT:

"There was no evidence that defendant was under substantial domination of another person. His wife was alternately in jail in Jacksonville, and Wisconsin for worthless checks and his mother was also in Wisconsin and he had no other relative in Jacksonville. While his wife was in the City Prison Farm in Jacksonville she caused the police to visit the Dobbert home to see to the welfare of the children because on a visit the defendant told her of the injuries suffered by the children and his punishment of them. Her influence, if any, was for him to look after and protect the children.

"From a reading of the pre-sentence investigation report which is attached hereto as EXHIBIT #1, it appears that his wife was under his domination to do criminal acts (cash worthless checks) for which she was later jailed."

After extensive written evaluation of the testimony of the psychiatrists, and as supported thereby, the trial judge concluded that defendant was mentally competent and able to understand the nature, quality and wrongfulness at the time of the crimes and had average intelligence. The trial court found no mitigating factor in defendant's age; he was a man of mature physical and mental years and of average intelligence. In general, the trial court concluded that there were no mitigating circumstances. The trial judge then proceeded to analyze each of the statutorily enumerated aggravating circumstances as they applied to this cause. In particular, as to the especially heinous, atrocious, and cruel nature of the murder of which defendant has been convicted, the trial court found, as follows:

"FACT:

"The defendant stands convicted of first degree murder of his 9 year old daughter, Kelly Ann Dobbert,

second degree murder of his 7 year old son, Ryder Scott Dobbert, torture of his then 11 year old son, Ernest John Dobbert, III, and child abuse of his then 5 year old daughter, Honore Elizabeth Dobbert.

"FACT:

"The evidence and testimony showed premediated and continuous torture, brutality, sadism and unspeakable horrors committed against all of the children over a period of time. The crimes were committed against the children constantly and it is difficult to separate the specific acts against the individual child. What was done to one—short of causing blindness and murder—was done to all. However, the Court has set forth below some of the cruel and brutal acts against Kelly Ann—in so far as trial notes and memory of testimony serve me correctly.

"Over the period of time of the latter portion of Kelly Ann's short, tortuous life the defendant did these things to her on one or many occasions:

1. Beat her in the head until it was swollen.
2. Burned her hands.
3. Poked his fingers in her eyes.
4. Beat her in the abdomen until 'it was swollen like she was pregnant.'
5. Knocked her against a wall and 'when she fell, kicked her in the lower part of the body.'
6. Held her under water in both the bath tub and toilet.
7. Kicked her against a table which cut her head —then defendant sewed up her wound with needle and thread.
8. Scarred her head and body by beating her with a belt and board—causing marks from her cheek, across the neck and down her back—which injuries

worsened without treatment 'until the body juices came out'.

9. On one occasion beat her continuously for 45 minutes.

10. On many occasions kicked her in the stomach with his shoes on, and on the night she died he kicked her a number of times.

11. Kept her out of school so that the many scars, cuts and bruises on her body would not be seen by others.

12. Defendant made no effort to get professional medical care and attention for the child and in fact actively prevented any outsiders from discovering her condition.

13. Choked her on the night she died and when she stopped breathing he placed her body in a plastic garbage bag and buried her in an unmarked and unknown grave."

and found that the aggravating circumstances were sufficient and great to warrant the imposition of the death penalty.

[1] Appellant initially claims reversible error in that the trial court denied his request that instructions on attempts be given pursuant to Rule 3.510, F.Cr.P.R. To this request, the trial judge responded:

> "I will not give those. I don't consider there to be any attempt on a homicide. I am familiar with the rule. I don't really think that it says that you have to do that. I have read it over a number of times. On a homicide you either have a homicide or you don't have a homicide."

Rule 3.510, F.Cr.P.R., provides:

> "Upon an indictment or information upon which the defendant is to be tried for any offense the jurors may convict the defendant of an attempt to commit such offense if such attempt is an offense, or may

> convict him of any offense which is necessarily included in the offense charged. The court shall charge the jury in this regard."

Relative to instructions as to attempts to commit charged offenses, this Court in *Brown* v. *State*, 206 So.2d 377 (Fla.1968), explained:

> "ATTEMPTS. Under § 919.16, a jury is empowered to convict a defendant of an attempt to commit the offense charged in the accusatory pleading, if such an attempt is itself an offense. Attempts generally are proscribed by § 776.04, supra. In limited situations attempts to commit described acts are defined as separate substantive offenses. For example, Fla. Stat. § 806.04, F.S.A. defines fourth degree arson in terms of an attempt to burn certain property.
>
> "Section 919.16, simply requires that in every case, the trial judge must determine as a matter of law whether an attempt to commit the crime charged would itself constitute an offense under Florida law. If he determines that it does, either under § 776.04, or under a separate statute, then he must instruct the jury on the subject of such attempt, and the jury may find guilt accordingly. In this situation it is immaterial whether the accusatory pleading specifically charges an attempt. Further, the charge must be given, even though, in the opinion of the trial judge, the proofs established guilt of the crime charged rather than a mere attempt to commit it."

Accord: *State* v. *Washington*, 268 So.2d 901 (Fla. 1972), and *Rayner* v. *State*, 273 So.2d 759 (Fla.1973).

Appellee posits that the failure of the trial court to instruct on law of attempt, in the instant case, does not constitute reversible error. Citing this Court's decision in *DeLaine* v. *State*, 262 So.2d 655 (Fla.1972), as authority for its position, appellee submits and we agree that the trial court's noncompliance with *Brown*, supra, and Rule 3.510, F.Cr.P.R., was error but was harmless error. In *DeLaine*, supra, the defendants had been charged, tried and convicted of rape. Therein, this Court found that the trial court erred in refusing to give the

requested charge on assault and battery which under the language of *Brown*, supra, constitutes a necessarily included offense; however, this Court in *DeLaine*, supra, applied the harmless error statute, explicitly opining:

> "It is apparent that we have not foreclosed, under appropriate circumstances, the invocation of Fla.Stat. § 924.33, F.S.A., which reads:
>
> > " 'No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.'
>
> "In the case *sub judice*, the trial judge did instruct the jury on the lesser included crime of assault with intent to commit rape, and the jury had before it an opportunity to convict the petitioners thereunder. This the jury did not do, but chose to convict petitioners under the greater charge of rape, obviously because the jury had before it overwhelming evidence of force and repeated penetration with prosecutrix, together with evidence of her utmost resistance. The record and transcript of this trial demonstrates that great force was used upon the prosecutrix and that she was raped repeatedly against her will and that throughout she fought and resisted to the best of her ability.
>
> "We hesitate to invoke the harmless error statute quoted above in a case of this magnitude, but we have determined that the petitioners received a fair trial and justice dictates an affirmance rather than a reversal. As a matter of common sense and logic, if the jury did not convict the petitioners of assault with intent to commit rape, the same jury would not convict them of assault and battery, *which is two steps removed* from the crime of which petitioners were convicted. Under the circumstances of this case, the failure to give the requested charge on assault and battery was harmless error."

Cf. *North* v. *State*, 65 So.2d 77 (Fla.1963), application of harmless error to death cases.

[2] The record, sub judice, shows that the jury was instructed on murder in the first degree, murder in the second degree, murder in the third degree, manslaughter, and justifiable and excusable homicide, and was further instructed:

> "If you return a verdict of guilty, it should be for the highest offense which has been proved beyond a reasonable doubt."

We agree with Justice Drew's rationale in *Spigner* v. *State*, 304 So.2d 496 (Fla.App. 1, 1974), and find its application most appropriate to the instant cause. Therein, he held, in pertinent part, as follows:

> "The record here shows that the trial judge charged the jury on: 1) murder in the second degree; 2) murder in the third degree; and 3) manslaughter, and defined these offenses to the jury with the admonition: 'If you return a verdict of guilty, it should be for the highest offense which has been proven beyond a reasonable doubt.' The conviction of appellant by this jury of the offense of murder in the second degree brings the failure of the trial judge to charge on attempt squarely within the scope of the harmless error statute, and the holding of the Supreme Court in *DeLaine* v. *State*. This Court should not reverse a judgment of conviction unless the error committed 'injuriously affected the substantial rights of the appellant'. The statute contemplates the commission of error by the trial judge, and we think it was error not to charge the jury as requested. The result reached by the jury, however, in finding the appellant guilty of murder in the second degree when it was empowered to find him guilty of two lesser offenses, presents the exact situation meant to be covered by the statute. The error

clearly did not injuriously affect the substantial rights of appellant."

The trial judge did not commit reversible error in failing to instruct on attempt.

[3] Relative to appellant's argument that the trial court erred in not allowing a change of venue, we find from the record that the trial judge did everything possible to insure an impartial trial for the defendant. The jurors, carefully and extensively examined by defense counsel to determine that they could be fair and impartial, were sequestered and comprehensive gag order was placed on all participants of the trial. As further evidenced by the record, seventy-eight prospective jurors were interviewed; allowed thirty-two peremptory challenges, the defense only exercised twenty-seven. Upon the selection of twelve persons, the trial judge denied the motion for change of venue with the following analysis:

"Both the State and the defendant have challenges left. We have selected the jury.

"Most times the jurors have heard about the case in some fashion from the media. However, a number of them did not hear about it. Some of them that did not hear about it are on the jury. Some are not.

"As I said those that were selected, in the main, if I recall correctly, at least I was satisfied. I'm sure counsel for both sides have different ideas. I'm satisfied some of them had no opinions. If they had opinions they said that it would not affect their decisions. Some had impressions about the nature of the case. So I deny the motion for a change of venue."

Appellant has failed to show that he did not receive a fair and impartial trial, that the setting of his trial was inherently prejudicial. Cf. *Murphy* v. *Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975) opinion filed June 16, 1975. The trial judge did not abuse his discretion in denying the motion for change of venue. Most recently in *Murphy* v. *Florida*, supra, the Supreme Court of the United States enunciated:

"The constitutional standard of fairness requires that a defendant have 'a panel of impartial, "indifferent" jurors.' *Irvin* v. *Dowd*, supra, 366 U.S. at 722, 81 S.Ct. [1639], at 1642, 6 L.Ed.2d 751. Qualified jurors need not, however, be totally ignorant of the facts and issues involved.

" 'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' *Id.*, at 723, 81 S.Ct. [1639] at 1642.

"At the same time, the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.' Ibid.

"The *voir dire* in this case indicates no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside. Some of the jurors had a vague recollection of the robbery with which petitioner was charged and each had some knowledge of petitioner's past crimes, but none betrayed any belief in the relevance of petitioner's past to the present case. Indeed, four of the six jurors volunteered their views of its irrelevance, and one suggested that pepole who have been in trouble before are too often singled out for suspicion of each new crime—a predisposition that could only operate in petitioner's favor." 421 U.S. at 800, 95 S.Ct. at 2036 (footnotes omitted).

Cf. *Hawkins* v. *State*, 206 So.2d 5 (Fla.1968).

Appellant raises several other points on appeal, none of which we find meritorious so as to constitute reversible error.

We have listened carefully to oral argument, examined and considered the record in light of the assignments of error and briefs filed and we have also, pursuant to Rule 6.16(b), Florida Appellate Rules, reviewed the evidence to determine whether the interests of justice require a new trial, with the result that we find no reversible error is made to appear and the evidence in the record, sub judice, does not reveal that the ends of justice require that a new trial be awarded.

[4] Upon considering all the mitigating and aggravating circumstances and upon careful review of the entire record in the cause, the trial court properly imposed the death penalty for the murder conviction. The trial judge stated in the conclusion of his sentencing statement:

> "I am not easily shocked or affected by tragedy or cruelty—but this murder of a helpless defenseless and innocent child is the most cruel, atrocious, and heinous crime I have every [sic] personally known of—and it is deserving of no sentence but death."

We agree.

Accordingly, no reversible error appearing, the judgments and sentences of the Circuit Court appealed from are hereby affirmed.

It is so ordered.

ADKINS, C. J., ROBERTS, J., and KLEIN, Circuit Judge, concur.

BOYD, J., dissents with an opinion.

OVERTON, J., concurs specially with an opinion.

ENGLAND, J., concurs in part and dissents in part with an opinion.

BOYD, Justice (dissenting).

I Dissent.

This cause is before us on direct appeal[2] from the Circuit Court of Duval County which entered a conviction of first degree murder based on a jury verdict, thereafter sentencing Appellant to death by electrocution. Although we are not here reviewing these additional matters, Appellant was simultaneously convicted of both second degree murder of his small son and child abuse in connection with the torturing of two of his other children, which led to the almost total blindness of his eldest son who was approximately thirteen years of age at the time of the murder being considered.

The only eyewitness to the murder was Appellant's son, John Dobbert, mentioned above, whose eyesight was twenty over two hundred (20/200). John testified that his father had brutally beaten his daughter Kelly Ann and, subsequently, had choked her; whereupon Appellant called John into the room to determine whether Kelly Ann had actually died. John testified that there were no signs of life and that it was his opinion that his sister was dead. Thereafter, Appellant dressed his daughter in her finest clothing, kept her lying on the bed for approximately two hours, placed her in a plastic bar and carried her to the attic. John testified that he did not see the body of his sister again and that he knew nothing of what was done with her body thereafter. There was inconsequential testimony that experts found some material in the attic which possibly could have been human blood, but this was not clearly established. The Appellant made rambling remarks concerning the possible whereabouts of his two dead children but never clearly admitted murder.

On appeal, Appellant relies in part upon the alleged error of the trial court in refusing to instruct the jury on certain lesser included offenses[3] and argues that the

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[2] Article V, Section 3(b)(1), Florida Constitution.

[3] Instructions were requested by Appellant on assault and battery, § 784.03, F.S. (1973); aggravated assault, § 784.04, F.S. (1973); and aggravated battery, § 784.045, F.S. (1973), as lesser included offenses to the charges of first degree murder.

Judge also erred when he refused to instruct the jury that they were authorized to convict the Appellant of attempted murder.[4] Rule 3.510, Rules of Criminal Procedure, provides that whenever a person is tried for a crime and the criminal statutes provide that an attempt to commit such a crime is also a crime, it is mandatory that the court instruct the jury that it is entitled to find the accused person guilty of an attempt to commit the crime in the same manner as the jury is entitled to find the defendant guilty of a lesser included offense.[5]

In this case the Appellant, through his attorney, moved the court not only to charge on the lesser included offenses but also specifically to charge on attempted murder.

This Court in *Hand* v. *State*,[6] held that defendants, upon request, were entitled to a charge on larceny when charged with robbery. In *Brown* v. *State*,[7] this Court held it was mandatory not only to instruct on necessarily included offenses if requested to do so but also to instruct

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[4] Section 776.04, Florida Statutes, states in pertinent part:

> "Whoever attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such an offense, but fails in the perpetration, or is intercepted or prevented in the execution of the same, shall, when no express provision is made by law for the punishment of such attempt, be punished as follows:
>
> (1) If the offense attempted is a capital or life felony, the person convicted shall be guilty of a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084."

(This seems to indicate that attempts generally contemplate attempts to commit capital crimes such as first degree murder.)

[5] Rule 3.510. *Conviction of Attempt; Lesser Included Offense*

> "Upon an indictment or information upon which the defendant is to be tried for any offense the jurors may convict the defendant of an attempt to commit such offense if such attempt is an offense, or may convict him of any offense which is necessarily included in the offense charged. The court shall charge the jury in this regard."

[6] 199 So.2d 100 (Fla. 1967).

[7] 206 So.2d 377 (Fla. 1968).

on attempts to commit the crime charged if such attempts constituted crimes. In *State* v. *Washington*,[8] and in *Rayner* v. *State*,[9] this Court held it was reversible error not to instruct on lesser included offenses even though a defendant requested the court not to give them.

In *Lewis* v. *State*[10] the District Court of Appeal, Fourth District, held that failure to charge on attempt to receive stolen property when the defendant was charged with receiving stolen property was reversible error. In *Herman* v. *State*[11] that same court held it reversible error not to instruct on lesser included offenses of manslaughter and aggravated assault when requested by defendant. In *Ward* v. *State*,[12] the Fourth District ruled that failure to charge on attempts to commit the crime charged, when such attempts are crimes, constitutes error in a case where defendant was charged with breaking and entering. In *Elmore* v. *State*[13] the defendant was tried for murder and convicted of manslaughter; the Fourth District reversed the conviction for failure of the trial judge to instruct the jury on aggravated assault as requested by the defendant. In *Levi* v. *State*[14] that District held that failure to instruct the jury that it could find defendant guilty of attempting to deal in credit cards belonging to another when charged with dealing with credit cards of another was reversible error. In *Bracy* v. *State*[15] the Fourth District decided that failure of the trial court to instruct on attempted murder, attempted robbery, and assault with intent to commit murder was reversible error, although the judge

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[8] 268 So.2d 901 (Fla. 1972).

[9] 273 So.2d 759 (Fla. 1973).

[10] 269 So.2d 692 (Fla. App. 1972).

[11] 275 So.2d 264 (Fla. App. 1973), *cert. den.*, 279 So.2d 308.

[12] 287 So.2d 138 (Fla. App. 1973); see also *Clements* v. *State*, 284 So.2d 700 (Fla. App. 1973), *cert. den.*, 294 So.2d 654.

[13] 291 So.2d 617 (Fla. App. 1974).

[14] 297 So.2d 617 (Fla. App. 1974).

[15] 299 So.2d 126 (Fla. App. 1974).

believed evidence clearly established murder; it was also held that a failure by the trial judge to give a requested instruction on the lesser included offense of assault with intent to commit robbery was reversible error.

The above holdings become acutely important with respect to any case in which the body of the alleged victim cannot be found. In this particular cause, the testimony of the victim's brother John was that the Appellant had severely beaten her and was choking her shortly before he decided that she was dead. Testimony in the record justified the jury in finding the Appellant guilty of murder in the first degree, and my observations herein should not be construed otherwise. Since the body of the deceased could not be found, however, the jury should have been instructed not only on lesser included offenses established by the testimony of the victim's brother John, but it should have been instructed also on attempted murder. It is remotely possible that the Appellant attempted to murder his daughter and that after removing her from the bed to the attic, considering her dead, she might have become conscious and fled. I make no such finding here, but since the statutes and rules of court require instruction on attempted murder, this appears to be a prime case in which the jury should have been instructed that, in its discretion, it could have found the Appellant guilty of attempted murder instead of murder. Human life is too precious to have an individual executed without being afforded all of the safeguards provided by the Constitutions, statutes and rules of court. While we have considered Florida's harmless error statute,[16] we feel that it is not applicable in this case, as the error was too great to be considered harmless.

The Appellant also argues that he was denied a fair trial by the court's failure to grant his motion for change of venue. Evidence in the record clearly shows that the cruelty and torture administered by the Appellant to his children became a subject of great interest among the people of the Greater Jacksonville, Florida, area at the time his crimes were made known by the

[16] Section 924.33, Florida Statutes.

news media. Further, it is apparent that the news media constantly continued to report the gruesome details of the case as they developed. An unusually high percentage of persons called as prospective jurors first informed the court that they were familiar with the case through the news media, and some of them even stated that they had opinions that the Appellant was guilty as charged but that they could remove such prejudice from their minds and could make an objective determination of his guilt or innocence.

The Constitutions of the United States and Florida permit the news media to write extensively about crime and criminals and to discuss the gory details of crime before and during trials. This is a constitutional right that I recognize and respect; however, other constitutional provisions grant persons charged with crime the right to be tried fairly, under due process of law, in an atmosphere of fairness and without prejudice in the minds of the jury. Rarely in the history of Florida has any crime created greater public attention than the activities of the Appellant in the treatment of his children, culminating in two convictions of murder and two convictions of child abuse. It is my opinion that the court should have granted the motion for change of venue in order that the Appellant might be tried in some part of Florida in which the magnitude of his crimes was not so widely known and so freely discussed among the populace.

I have considered other points raised by the Appellant and deem them to be without substantive merit. I feel that the court committed reversible error in not charging the jury that it was authorized by law to find the Appellant guilty of attempted murder or the lesser included offenses of aggravated assault, aggravated battery, and assault and battery. Also, I feel that the court committed reversible error in denying Appellant's motion for change of venue. For the foregoing reasons I would quash the judgment of the trial court and remand the cause for a new trial at a location substantially away from the City of Jacksonville.

I therefore dissent.

OVERTON, Justice (concurring specially).

I concur in the majority opinion including the sentence of death. In my opinion, the facts in the record together with the explicit findings by the trial judge meet the test set forth in *Tedder* v. *State*, 332 So.2d 908 (Fla. 1975), Opinion filed November 19, 1975, concerning a sentence of death after a jury recommendation of life imprisonment.

ENGLAND, Justice (concurring in part and dissenting in part):

I fully agree with all aspects of the Court's opinion through its conclusion that the evidence "does not reveal that the ends of justice require that a new trial be awarded." I dissent from that part of the decision which upholds the trial judge's imposition of a death penalty.

In *Tedder* v. *State*, 332 So.2d 908, opinion filed November 19, 1975, we articulated a sensible standard for reviewing the conflicting sentences of juries and judges in death penalty cases. We there said:

> "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

Applying that standard here, I would hold that reasonable persons could disagree with the trial judge,* and that the jury's recommendation of life imprisonment should be adopted.

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* As the majority observes, by imposing and discussing the basis for consecutive sentences the trial judge anticipated the possibility that reasonable people could differ with him.

IN THE SUPREME COURT OF FLORIDA

Case No. 45,558

ERNEST JOHN DOBBERT, JR., APPELLANT

vs.

STATE OF FLORIDA, APPELLEE

PETITION FOR REHEARING

Comes now the Appellant, by and through his undersigned attorney, pursuant to Florida Appellate Rules 3.14 and 6.17, and moves this Honorable Court to grant a rehearing in this cause. In support thereof, Appellant would show the following:

1. The opinion of this Honorable Court, in the case *sub judice*, once again failed to follow the constitutional dictates of *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 246 (1972). In *Alvord* v. *State*, 322 So. 2d 533, (Fla. 1975), this Court said at page 540:

> ". . . Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case. . ."

The imposition of the death penalty under our statute, as described above, does nothing more than foster confusion, arbitrariness, unbridled and uncontrolled discretion and inequality of results so strongly proscribed in *Furman, supra.*

2. The opinion of this Honorable Court fails to recognize that the aggravating and mitigating circumstances, enumerated in Florida Statute, Section 921.141, under which criteria the death penalty may or may not be imposed, are nothing more than unspecific, general and non-

exclusive standards which are easily manipulated to suit the particular leanings of the decision maker, whether it be jury, trial judge or this Honorable Court, and accordingly, these standards are arbitrary, capricious and wholly at variance with the rationale of *Furman, supra.* Furthermore, to give and take away life at various stages of the trial depending upon how these standards are interpreted by the jury, trial judge or this Honorable Court under our triune system is in and of itself cruel and unusual punishment.

3. The trial court and this Honorable Court ignored the jury's advisory sentence, signed by ten of its twelve members, finding that there were not sufficient aggravating circumstances to justify a sentence of death and that there were sufficient mitigating circumstances to justify the sentence of life imprisonment (Record—page 113). In *Tedder* v. *State*, 322 So. 2d 908, (Fla. 1975), this Court said at page 910:

> ". . . A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually *no reasonable person could differ* . . ." (emphasis ours).

Are we to conclude from the decision in the case at bar that only a simple majority of appellate judges are to be considered reasonable persons and that ten jurors, who saw and heard all the testimony and evidence, are unreasonable persons within the language articulated by this Honorable Court in *Tedder, supra*? In the case at bar, Petitioner urges that the facts suggesting a sentence of death were not so clear and convincing that virtually no reasonable person could differ, but to the contrary, the facts suggested a sentence of life imprisonment to ten reasonable persons—the ten jurors who signed the advisory sentence. In a criminal case, should not the differences of reasonable persons be resolved favorable to the defendant, especially when ten

of those who differ are jurors, who more truly reflect the conscience of the community?

4. Appellant seeks a rehearing on the issue of the applicability of the new death penalty sentencing procedure insofar as this Honorable Court relied on the holding in *Lee* v. *State*, 294 So. 2d 305 (Fla. 1974). Appellant would suggest that the holding of *Lee* was misstated by Appellee and perhaps this court relied on that misstatement (see Appellee's brief at pages 93 and 94 wherein Appellee concludes that *Lee* stands for the proposition that "there is no ex post facto ban" to the new death penalty sentencing provisions).

To the contrary, the holding in *Lee, supra* was stated by this Honorable Court at the conclusion of the passage cited by Appellee as follows:

> ". . . *Since this is not the case*, that portion of the District Court's opinion dealing with which law is applicable for the imposition of sentence, Fla. Stat., Sec. 775.082, F.S.A., as amended by Chapter 72-724, *must be reversed with instructions to apply the penalty provision in effect at the time of the commission of the offense.*" (emphasis ours). *Id.* at 307.

Apparently, Appellee missed the importance of this final sentence. *Lee* held that the change in the law *did* affect the penalty and *did* expose *Lee* to a greater penalty and thus required application of the old law.

However, even if Appellee's reading of *Lee* is correct, *Lee* and the case *sub judice* are distinguishable. In *State* v. *Lee*, 286 So. 2d 596 (1st D.C.A., Fla. 1973), Judge Spector, finding no ex post facto principles applicable to Section 921.141, Florida Statutes, F.S.A., cited *Rooney* v. *State of North Dakota* at page 599:

> ". . . It did not create a new offense, nor aggravate or increase the enormity of the crime . . . nor require the infliction upon the accused of any *greater or more severe punishment than was prescribed by law at the time of the commission of the offense.*" (emphasis ours).

And citing Wharton's Criminal Law Procedure, Vol. 1, Sec. 20, Judge Spector continued:

> "Changes in the method of carrying out the sentence or the form of execution are not deemed prohibited as an ex posto law *when they do not in substance operate to the detriment of the defendant.*"
>
> * * * *
>
> " 'For example, a statute providing a new method of inflicting the death penalty is not an ex post facto law *as to persons already sentenced to death* when the (new) statute gives the defendant the choice of methods.'
>
> Citing *Wetzel* v. *Wiggins*, 226 Miss. 671, 85 So. 2d 469, *cert. den.* and appl. dismd. 352 U.S. 807, 77 S.Ct. 80, 1 L.Ed. 2d 39." (emphasis ours).

Judge Spector was dealing with a defendant who had already been sentenced to death. The changed law could in no way *increase his penalty.* The only question was to determine which method would be used in the *de novo* sentencing proceeding. *Lee* could not receive any greater penalty under the new procedure than he received under the old.

On the other hand, Appellant, under the old law, would have received a mandatory sentence of life (10 jurors voted for life imprisonment). Under the new law, Appellant clearly lost the mandatory life sentence and was subjected to the added element of judicial discretion which, as it was in fact applied, resulted in the imposition of the greater penalty of death.

The new statute has, in fact, greatly increased Appellant's penalty and has operated against him to his detriment, thus meeting the criteria for a violation of the ex post facto principle.

5. This Honorable Court erred in the case *sub judice* when it ruled that it was harmless error for the trial court not to instruct on attempted murder under the rationale of *De Laine* v. *State*, 262 So. 2d 655 (Fla. 1972) and *Spigner* v. *State*, 304 So. 2d 496 (Fla. App. 1, 1974). Petitioner submits that both cases cited in

this court's opinion are readily distinguishable from the case at bar. In *De Laine*, an instruction on attempt was not in issue, and in *Spigner*, the facts were not susceptible to the conclusion that perhaps there had been no homicide. To rely upon the doctrine of harmless error, in the case at bar, when the facts are so uniquely applicable to warrant an instruction on attempted murder is to arbitrarily deny Appellant his constitutional right of equal protection of the law. The fact that Appellant was subsequently convicted of murder does not justify the trial court's refusal to charge on attempt and thereby preclude defense counsel's argument and the jury's consideration of this important issue.

WHEREFORE, Appellant requests this Honorable Court to grant a rehearing in this case and to vacate Appellant's conviction and sentence of death.

Respectfully submitted,

/s/ Louis O. Frost, Jr.
LOUIS O. FROST, JR.
Public Defender
Fourth Judicial Circuit
221 Duval County Courthouse
Jacksonville, Florida 32202
Attorney for Appellant

[Certificate of Service Omitted in Printing]

IN THE SUPREME COURT OF FLORIDA

Case No. 45,558

ERNEST JOHN DOBBERT, JR., APPELLANT

vs.

STATE OF FLORIDA, APPELLEE

MOTION FOR LEAVE TO AMEND PETITION FOR REHEARING

Comes now the Appellant, Ernest John Dobbert, Jr., by and through his undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, and moves this Honorable Court for leave to amend Paragraph 5 of his Petition for Rehearing filed in this cause on January 29, 1976, by adding the additional language as follows:

5. . . . Further, the opinion of this Honorable Court should now be controlled by this Court's subsequent opinion in *State of Florida* v. *Gwendolyn Terry*, Case No. 46,370, filed February 25, 1976, quashing the District Court's opinion. In that case this Court held that the refusal of the trial court to instruct the jury on necessarily included lesser offenses was, in fact, *prejudicial* and *reversible* error and further held that:

> "*Any prior appellate decisions* conflicting with the principles announced herein are expressly overruled." (Emphasis ours)

If, as this Court so aptly holds in *Terry*, refusal to instruct on an applicable lesser included offense, regardless of a subsequent conviction for a higher offense, is prejudicial error; then it is incumbent upon this Honorable Court to hold that refusal to instruct on attempted murder, which was required as a matter of law and so apropos to the unique facts of the case *sub judice*, was likewise prejudicial and reversible error.

In Support Thereof, Appellant would urge this Court to follow the dictates of *Terry*, *supra*, which opinion was not filed when this Honorable Court rendered its opinion in the case *sub judice*. The conviction in the case at bar

should not be affirmed on the basis of harmless error when a subsequent decision of this Court conflicts with the principles announced therein.

WHEREFORE, Appellant respectfully requests this Honorable Court to grant his Motion for Leave to Amend his Petition for Rehearing previously filed herein by entering an appropriate order incorporating and making a part thereof the requested addition to Paragraph 5 set forth in this Motion.

Respectfully submitted,

/s/ Louis O. Frost, Jr.
LOUIS O. FROST, JR.
Public Defender
Fourth Judicial Circuit
221 Duval County Courthouse
Jacksonville, Florida 32202
Attorney for Appellant

[Certificate of Service Omitted in Printing]

IN THE SUPREME COURT OF FLORIDA

January Term, 1976

Monday, April 5, 1976

Case No. 45,558

ERNEST JOHN DOBBERT, JR., APPELLANT

vs.

STATE OF FLORIDA, APPELLEE

On consideration of the Petition for Rehearing and amendment thereto filed by appellant and Response,

IT IS ORDERED that said petition is denied.

OVERTON, C.J., ROBERTS, ADKINS AND ENGLAND, J.J., AND KLEIN, CIRCUIT JUDGE, CONCUR

BOYD, J., DISSENTS

A True Copy

TEST:

/s/ Sid J. White
SID J. WHITE
Clerk Supreme Court

IN THE SUPREME COURT OF FLORIDA

Case No. 44,991

ERNEST JOHN DOBBERT, JR., APPLICANT

v.

STATE OF FLORIDA, RESPONDENT

APPLICATION FOR CONSTITUTIONAL STAY OF TRIAL

The Applicant, John Ernest Dobbert, Jr., by and through his undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, respectfully presents this application pursuant to Florida Appellate Rule 4.5 (g) and moves this Honorable Court to enter its order staying trial in this cause.

The Applicant, John Ernest Dobbert, Jr., seeks this extraordinary order upon the following reasons:

STATEMENT OF FACTS

1. That on December 27, 1973, the Applicant was charged by Indictment. Counts One and Two charged the offense of murder contrary to Florida Statute section 782.04, alleging that these offenses were committed on December 31, 1971, in Count One and between January 1, 1972, and April 8, 1972, in Count Two. Counts Three and Four alleged child torture. (Appendix A.)

2. That on January 14, 1974, the Applicant filed a Motion to Dismiss alleging *inter alia* that Counts One and Two of the Indictment should be dismissed because the bare allegation of a violation of Florida Statute section 782.04 did not adequately inform the Applicant of the offenses or the possible penalty. (Appendix B.)

3. That on January 15, 1974, the Applicant filed a Motion requesting the trial court to specify the manner of trial, the number of trial jurors, and the penalties applicable to Counts One and Two of the Indictment. (Appendix C.)

4. That on January 30, 1974, the Applicant filed a Motion for Continuance (Appendix D) requesting the trial court to stay the trial in this cause until this Court renders its opinion in the pending case of *Lee* v. *State*, cert. granted January 24, 1974.

5. That on February 6, 1974, orally and in open court, the trial court dismissed Counts Three and Four of the Indictment, pursuant to the Applicant's Motion to Dismiss, on the ground that the Indictment violated the statute of limitations applicable to the offenses of child torture and ruled that, under his conception of the opinion of the First District Court of Appeal in *State* v. *Lee*, 286 So. 2d 596 (1st DCA Fla. November 27, 1973), Fla. Sup. Ct. cert. granted, January 24, 1974, this was a capital offense and that the maximum sentence applicable was death.

6. That, also on February 6, 1974, the trial court denied the Applicant's Motion for Continuance that requested stay of trial pending this Court's decision in *Lee* v. *State, supra.*

JURISDICTION

7. That Florida Appellate Rule 4.5(g) articulates the authority of this Supreme Court of Florida to issue a constitutional writ in extraordinary situations.

8. That this cause, if conviction is obtained in circuit court, would be reviewable on direct appeal to this Supreme Court of Florida.

9. That this stay applied for by the Applicant is limited solely to the actual trial of this cause.

10. That the Applicant is now and will remain in custody in the Duval County Jail under no bond and hereby announces his willingness to waive the Speedy Trial Rule.

11. That this application is presented in manifest good faith and is not for the purposes of delay.

12. That, as mandated in *Couse* v. *Canal Authority*, 209 So. 2d 865 (Fla. 1968), this Court has jurisdiction under the "all writs" provision of our constitution (FLA. CONST. art. V, section 3(b)(4)) in all cases which are within its appellate jurisdiction. This Court has supervisory jurisdiction pursuant to Article V of the Florida Constitution over all courts so that the laws of our State may be properly executed.

13. That the trial court in this cause has denied the Applicant's motions which seek this remedy and has announced its intention to set this case for trial for either March 11 or March 18, 1974.

IRREPARABLE INJURY

14. That, if this court fails to exercise its supervisory constitutional power, the Applicant will suffer irreparable injury in the trial court.

15. Irreparable injury will occur because:

> The Applicant is charged with commission of a murder on December 31, 1971, and with commission of a second murder at some time between January 1, 1972, and April 8, 1972. At the time these offenses were allegedly committed, Florida law for murder in the first degree provided for a death penalty unless the jury recommended mercy. FLA. STAT. 782.04, 775.082 (1971). That on July 17, 1972, pursuant to the United States Supreme Court decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), this Court held the Florida death penalty provisions inoperative. *Donaldson* v. *Sack*, 265 So. 2d 499 (Fla. 1972).
>
> Following *Donaldson* v. *Sack*, this Court in *Anderson* v. *State*, 267 So. 2d 8 (Fla. 1972), and in *In re Baker* 267, So. 2d 331 (Fla. 1972), commuted all death sentences previously imposed to life imprisonment. On December 8, 1972, the Governor of our State of Florida signed into law Chapter 72-724, Laws of Florida (1972), which reinstated capital punishment in this State. This law was upheld on July 26, 1973, in *State* v. *Dixon*, 283 So. 2d 1 (Fla. 1973).
>
> Until the decision of the District Court of Appeal, First District, in *State* v. *Lee*, *supra*, trials under the old Florida murder statute were conducted as

non-capital offenses. In *State* v. *Lee*, the district court held that the penalty provisions of the new Florida murder statute were procedural and not sbustantive and, thus, a conviction while proceeding under the old murder statue was susceptible to the new provisions for capital punishment. Lee was convicted after trial by jury and sentenced to death prior to this Court's decision in *Donaldson* v. *Sack*, *supra*. Following the United States Supreme Court's opinion in *Furman* v. *Georgia*, *supra*, the trial court commuted Lee's sentence and imposed the sentence of life imprisonment. The State of Florida appealed and the District Court of Appeal remanded that cause for resentencing under Florida Statute 921.141 (1973), holding that the later valid enactment of the death penalty would apply to Lee. The District Court of Appeal denied rehearing on January 7, 1974, but certified that question to this Supreme Court of Florida. Oral argument, following the submission of written briefs by the parties, is scheduled for March 14, 1974. The trial court in this cause was denied the Applicant's motions requesting stay of trial (and only trial) until the question of penalty, as represented by *State* v. *Lee*, is finally disposed. Pursuant to Florida Appellate Rule 4.5(c)(6), the decision of the District Court of Appeal in *State* v. *Lee* is not mandated, and thus not final and not law.

The trial court has ruled that the Applicant is susceptible to the penalty of death in Counts One and Two of the Indictment, which charge the offense of murder under the old Florida murder statute. It is impossible for Applicant's counsel to adequately advise him of his rights and possible liabilities until the *Lee* case is finalized. There clearly will be different advice from attorney to client in any cause where the death penalty is a possibility as opposed to a cause where even conviction of the highest offense will not expose the defendant to loss of his life, the ultimate punishment.

As the decision in *State* v. *Lee* now stands, serious constitutional questions arise concerning the denomination of this cause as capital.

First, the possible imposition of a death penalty appears to violate the prohibition against ex post facto laws. FLA. CONST. art. I, section 10; U.S. CONST. art. I, section 9(3); amend. XIV. Application of the death penalty would provide a sanction held inoperative as respects the old Florida murder statute under which the Applicant is charged.

Second, the possibility of imposition of the death penalty appears to deny the equal protection and due process of the laws guaranteed to the Applicant. FLA. CONST. art. I, 9; U.S. CONST. amends V, XIV. If this trial had occurred prior to the decision in *State* v. *Lee*, the prosecution would have proceeded as a non-capital offense.

Third, the possibility of capital punishment would also appear to violate equal protection and due process since, if the Applicant had been tried at the time the alleged offenses took place, his possible death sentence would have been commuted to life imprisonment under *Anderson* v. *State* and *In re Baker*, *supra*.

16. That the prosecution of this cause will not be injured nor will the State of Florida suffer irreparable injury if trial is stayed until this Court's determination of the certified question in *State* v. *Lee*, *supra*.

WHEREFORE, the Applicant, John Ernest Dobbert, Jr., prays this Honorable Court to issue its order to stay the trial, and solely the trial, in this cause until a final determination has been made in *Lee* v. *State*, a determination which appears dispositive of the Applicant's contentions. The Applicant further prays that if this Court should determine that Applicant seeks an improper remedy this Honorable Court, pursuant to Florida Constitution Article V, section 2(a), will consider this application in the proper light and provide the appropriate remedy for this application.

Dated this 8th day of February, 1974.

Respectfully submitted,

LOUIS O. FROST, JR.
Public Defender

/s/ James O. Brecher
JAMES O. BRECHER
Assistant Public Defender
Fourth Judicial Circuit
Duval County Courthouse
Jacksonville, Florida
Attorney for Applicant

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST., art. I, Section 10, provides:

> "No state shall enter into any Treaty Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin and Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

U.S. CONST., amend. XIV, Section 1, provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FLA. CONST., art. I, Section 10, provides:

> "Prohibited laws.—No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."

FLA. CONST., art. X, Section 9, provides:

> "Repeal of criminal statutes.—Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed."

FLA. STAT., Section 921.141 (1971) provides:

> "Recommendation to mercy.—A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation to mercy by a majority of the jury. When the verdict includes a recommendation to mercy by a majority of the jury, the court shall sentence the defendant to life imprisonment. A defendant found guilty by the court of an offense punishable by death on a plea of guilty or

when a jury is waived shall be sentenced by the court to death or life imprisonment."

FLA. STAT., Section 775.082 (1971) provides:

"Penalties for felonies and misdemeanors.—(1) A person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment. A defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment, and the discretion of the court."

FLA. STAT., Section 775.082 (1972 Supp.) provides:

"Penalties for felonies and misdemeanors.—(1) A person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment. A defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment, in the discretion of the court.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person who has been convicted of a capital felony shall be punished by life imprisonment.

(3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment with no eligibility for parole."

FLA. STAT., Section 775.082 (1973) provides:

"Penalties for felonies and misdemeanors.—(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedures set forth in Sections 921.141 result in findings by the court, that such person shall be punished by death, and in the latter event, such person shall be punished by death.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).

(3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1)."

Ch. 72-724, Laws of Florida (1972).

FLA. STAT., Section 921.141 (1973).

CHAPTER 72-724

House Bill No. 1-A

AN ACT relating to capital punishment; amending § 775.081(1), Florida Statutes, providing for a life felony; amending § 775.082, Florida Statutes, as amended by chapter 72-118, Laws of Florida, to provide punishment for capital and life felonies; amending § 782.04, Florida Statutes, to specify the crimes constituting murder and the penalties; amending § 779.07, Florida Statutes, to make intentional injury

to property a life felony; amending § 790.16, Florida Statutes, providing for new penalties for throwing or discharging bombs or discharging machine guns in public places; repealing subsections (3) and (4) of § 790.16, Florida Statutes, relating to recommendation of mercy and judicial discretion in sentencing; amending § 790.161, Florida Statutes; providing new penalties for throwing, placing, or discharging any destructive device, depending on degree of harm inflicted; amending § 794.01, Florida Statutes, providing new penalties for crimes of rape; amending § 805.02, Florida Statutes, providing that kidnapping for ransom shall be a life felony; amending § 921.141, Florida Statutes, as amended by chapter 72-72, Laws of Florida, providing a separate proceeding to determine sentence in capital cases; providing a severability clause; providing an effective date.

Be It Enacted by the Legislature of the State of Florida;

Section 1. Subsection (1) of section 775.081, Florida Statutes, is amended to read:

775.081 Classifications of felonies and misdemeanors.—

(1) Felonies are classified, for the purpose of sentence and for any other purpose specifically provided by statute, into the following categories:

(a) Capital felony;

(b) *Life felony*;

(c) Felony of the first degree;

(d) Felony of the second degree; and

(e) Felony of the third degree.

A capital felony *and a life felony* must be so designated by statute. *Other felonies are* of the particular degree designated by statute. Any crime declared by statute to be a felony without specification of degree is of the third degree, except that this provision shall not affect felonies punishable by life imprisonment for the first offense.

COMMENT: Provides a new category of felony to serve as an additional deterrent to those crimes, while not classified capital, are especially serious in nature.

Section 2. Section 775.082, Florida Statutes, as amended by chapter 72-118, Laws of Florida, is amended to read:

775.092. Penalties for felonies and misdemeanors.—

(1) A person who has been convicted of a capital felony shall be punished by *life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by* death, *and in the latter event such person shall be punished by death.*

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment *as provided in subsection (1).*

(3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment *as provided in subsection (1).*

Section 9. Section 921.141, Florida Statutes, as amended by chapter 72-72, Laws of Florida, is amended to read:

(Substantial rewording of section. See section 921.141, F.S., as amended by chapter 72-72, Laws of Florida, for present text.)

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) Upon conviction or adjudication of guilt of a defendant or a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury empaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; and further provided that this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh aggravating circumstances found to exist, and

(c) Based on these considerations whether the defendant should be sentenced to life or death.

(3) Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its

findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and based upon the records of the trial and the sentencing proceedings.

(4) If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

(5) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Supreme Court.

(6) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment;

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

(c) The defendant knowingly created a great risk of death to many persons;

(d) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or any attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the un-

lawful throwing, placing or discharging of a destructive device or bomb;

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(f) The capital felony was committed for pecuniary gain;

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious or cruel.

(7) Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity;

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(c) The victim was a participant in the defendant's conduct or consented to the act;

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(e) The defendant acted under extreme duress or under the substantial domination of another person;

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(g) The age of the defendant at the time of the crime.

Section 10. It is declared to be the legislative intent that if any section, subsection, paragraph, sentence, clause, provision or word of this act is held to be invalid, the remainder of the act shall not be affected.

Section 11. This act shall take effect upon becoming a law.

Approved by the Governor December 8, 1972.

Filed in Office of Secretary of State December 8, 1972.

CHAPTER 921

SENTENCE

921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury empaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstance found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life * [imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES. — Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

SUPREME COURT OF THE UNITED STATES

No. 76-5306

ERNEST JOHN DOBBERT, JR., PETITIONER

v.

FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Florida.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 8, 1976

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